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January 13, 2010

Via Hand Delivery

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Ex Parte Submission in *Review of the Commission's Program Access Rules*, MB Docket Nos. 07-29, 07-198

In response to an inquiry by Media Bureau staff, attached are redacted versions of the responsive filings of CoxCom, Inc. in the case of AT&T Services, Inc., et al. v. CoxCom, Inc., CSR-8066-P. Pursuant to Section 1.1206(b)(2) of the Commission's rules, 47 C.F.R. § 1.1206(b)(2), a copy of this notice is being filed in the above-captioned dockets.

Respectfully submitted,

/s/

David J. Wittenstein
Counsel for CoxCom, Inc.

Enclosures

cc: Austin Schlick
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STAMP & RETURN

October 27, 2008

FILED/ACCEPTED
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Federal Communications Commission
Office of the Secretary

VIA HAND DELIVERY

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: **HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN AT&T SERVICES, INC. v. COXCOM, INC., CSR-8066-P before the Federal Communications Commission**
Answer to Amended Program Access Complaint

Dear Ms. Dortch:

In accordance with Paragraph 9 of the Media Bureau's *Order* released October 3, 2008, in the above-referenced proceeding, DA 08-2227, I am submitting herewith one copy of the confidential version of Cox's Answer to Amended Program Access Complaint and two copies of the redacted version of that pleading.

Please inform me if any questions should arise in connection with this submission.

Respectfully submitted,

David J. Wittenstein

David J. Wittenstein

cc: Lynn R. Charytan
Heather M. Zachary
Dileep S. Srihari
Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
AT&T Services, Inc. and	)	
Pacific Bell Telephone Company	)	
d/b/a SBC California	)	
d/b/a AT&T California,	)	File No. CSR-8066-P
	)	
Complainants,	)	
	)	
v.	)	
	)	
CoxCom, Inc.	)	
	)	
Defendant	)	

ANSWER TO AMENDED PROGRAM ACCESS COMPLAINT

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Dated: October 27, 2008

REDACTED – FOR PUBLIC INSPECTION

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v.	)	
	)	
CoxCom, Inc.	)	
	)	
Defendant	)	

ANSWER TO AMENDED PROGRAM ACCESS COMPLAINT

CoxCom, Inc. ("Cox"), by its attorneys and pursuant to Section 76.1003(e) of the Commission's Rules, 47 C.F.R. § 76.1003(e), hereby submits this Answer to AT&T's Complaint.

I. SUMMARY AND INTRODUCTION

In this case, AT&T asks the Commission to ignore the statutory language and clear intent of Congress behind Section 628 of the Communications Act, and reverse a decade of precedent, without any valid legal or factual justification. After choosing to enter a highly competitive San Diego market for video programming – without even so much as a modest investment in local programming – AT&T asks the Commission to contravene the statute and rewrite the rules in its favor so that AT&T can piggyback on Cox's long-term commitment to providing local news, sports, and entertainment in San Diego. AT&T's argument fails under fundamental principles of

statutory construction, and it has been soundly and repeatedly rejected in Commission decisions stretching back to 1998. It should be rejected once again.

AT&T's theory is that the satellite cable program access provisions of Section 628 – which address access to satellite-delivered programming – should be expanded to apply to Cox's locally originated cable channel in San Diego, "Channel 4 SD," a terrestrially-delivered programming service.

There is no precedent for the relief AT&T requests. To the contrary, all the precedent – every Bureau decision, Commission decision and court decision – that has addressed the issue of forcing carriage of terrestrial programming has rejected the very arguments AT&T is advancing again here.[1] In fact, the Commission recently confirmed that Section 628 and the Commission's program access rules do not reach terrestrially-delivered cable programming and has asked for comment on whether its rules can or should be extended to cover such programming.[2] The fact that the rules would have to be amended to cover such programming demonstrates that those

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1 *See* DirecTV, Inc. v. Comcast, *Memorandum Opinion and Order*, 13 FCC Rcd 21822, 21834-35 ¶ 25 & nn. 101-102 (Cab. Serv. Bur. 1998) ("*DirecTV*"); Echostar Communications Corporation v. Comcast, *Memorandum Opinion and Order*, 14 FCC Rcd 2089, 2099 ¶ 21 & nn. 86-87 (Cab. Serv. Bur. 1999) ("*Echostar*"), *consolidated and aff'd on review, Memorandum Opinion and Order*, 15 FCC Rcd 22802, 22807 ¶¶ 12-13 (2000) ("*DBS Review Order*"), *aff'd Echostar Communications Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002); RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp., *Memorandum Opinion and Order*, 14 FCC Rcd 17093, 17106, ¶ 21 (Cab. Serv. Bur. 1999) ("*RCN*"), *aff'd on review, Memorandum Opinion and Order*, 16 FCC Rcd 12048, 12053 ¶ 15 (2001) ("*RCN Review Order*"); Everest Midwest Licensee, L.L.C. v. Kansas City Cable Partners and Metro Sports, *Memorandum Opinion and Order*, 18 FCC Rcd 26681-82, 83-84 ¶¶ 5-7, 10 (Med. Bur. 2003) ("*Everest*").

2 *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *Report and order and Notice of Proposed Rulemaking*, 22 FCC Rcd 17791, 17860-61 ¶¶ 116-117 (2007) ("*Program Access NPRM*").

rules do not cover it now, and an adjudication applying current law cannot be used to change those rules.

In all its past decisions, the Commission has ruled that a Section 628 program access complaint seeking access to terrestrial programming must be rejected as a matter of law under clear principles of statutory construction. Those cases are controlling here, and they were correctly decided. As the Commission held, it is clear from the statutory language and the legislative history of Section 628 that, while Congress intended to require access to satellite programming, it specifically did not intend to include terrestrial programming within the statute's limited scope, recognizing the value in cable operators investing in the development of local programming. Accordingly, in *DirecTV*, *Echostar*, and *RCN*, the Commission affirmed that Section 628(b) does not apply to terrestrially-delivered programming.

The only potential exception the Commission noted was in cases of "evasion" of the rules where a cable operator lacks any legitimate business reason to distribute programming terrestrially and has moved programming from satellite to terrestrial delivery just to circumvent the rules. No such conduct is alleged here, nor could it be. Channel 4 SD is and always has been terrestrially-delivered for the obvious business reason that it is a local channel with no need for the more expansive (and expensive) satellite distribution services.

AT&T seeks to avoid all these facts and legal precedents by arguing that the unfair competition provisions of Section 628(b), along with a number of other statutory provisions, can be cobbled together to give the Commission the power to force Cox to provide its terrestrial programming to AT&T. AT&T argues for a remarkably broad new rule that would render any competitive conduct by a cable operator toward an MVPD whose service includes satellite cable programming an unfair or deceptive act under Section 628(b). Under AT&T's theory, even the

denial of terrestrially-delivered programming, for legitimate business reasons and without any evidence of "evasion," could be illegal under Section 628(b), notwithstanding Congress' clear intent and this agency's long line of precedent to the contrary.[3]

The only support AT&T offers is the Commission's decision in the *MDU Order*,[4] but that decision is easily distinguished and not relevant to this case. The *MDU Order* addressed conduct alleged to entirely preclude competition for customers in MDUs, and, more importantly, it did not involve a denial of programming at all. The *MDU Order* cannot be expanded to apply here because Congress made it explicitly clear that a denial of terrestrially-delivered programming is lawful under Section 628(b) and cannot be the basis for an unfair act or practice. Certainly, the *MDU Order* did not address that clear Congressional intent, and it did not purport to reverse a decade of existing law under Section 628(b).

AT&T dedicates much of its Complaint to trying to demonstrate that it needs Channel 4 SD to compete effectively in the San Diego market. Section 628, however, does not allow AT&T to require Cox to provide its terrestrially-delivered service by government mandate, no matter how popular or how desirable AT&T finds the programming. Most of AT&T's Complaint is irrelevant under Section 628(b) as a matter of law.

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[3] In fact, AT&T argues that the Commission should reach out with an unprecedented reading of Section 628(b) not only to require the provision of terrestrial programming for the first time but also to punish Cox with a damages award for, in effect, following the rules without anticipating a complete reversal of the law.

[4] *See* Complaint ¶¶ 52-55, 59, 61-62 (citing Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 20235 (2007) ("*MDU Order*")).

In any event, even if AT&T's factual argument were relevant, it is badly flawed and unpersuasive. The argument is built around internally-gathered anecdotal information; plainly biased, incomplete and unprofessional surveys; and selective statistics. As demonstrated below, under widely-accepted and applied principles of law, such "evidence" cannot be relied upon and should be rejected out of hand. But even if the data were accepted for purposes of argument, the conclusions AT&T tries to draw from them are illogical; they simply do not show that AT&T's lack of access to Channel 4 SD has caused it competitive harm. To the contrary, the data (even if assumed valid) would show only a very small impact on the competitive market.

The fact is, the MVPD market in San Diego is highly competitive, and AT&T knew that going in. The Commission agreed when it recently granted Cox's effective competition petition for most of the San Diego area. MVPDs, including Cox, naturally try to differentiate themselves from their competition through customer service, local community involvement and unique programming, among other things, and Channel 4 SD is Cox's unique commitment to the people of San Diego.

AT&T has taken a very different approach. Unlike Cox's long-term and ongoing commitment to the San Diego community, AT&T has taken every measure to avoid investment in the local community, unless absolutely required. AT&T's strategy is to develop a one-size-fits-all video service that it can roll out in all its markets nationally, with little, if any, individualized focus on the needs of local communities. AT&T is free to pursue whatever strategy it chooses, but it cannot rewrite statutes, ignore congressional history, and reverse long-standing law to avoid fair competition. And AT&T can hardly argue that exclusive arrangements are, by their nature, unfair because AT&T has its own exclusive deals (*e.g.*,

DirecTV partnership including NFL Sunday Ticket Package, iPhone, and many other exclusive programming deals, described below).

AT&T's Complaint fails because Cox has not engaged in an unfair or deceptive practice by lawfully declining to provide access to its terrestrially-delivered programming. Cable operators cannot be forced by government mandate under Section 628(b) to provide their local, terrestrially-delivered programming to competitors. Whether that congressional enactment should be altered is a debate not properly resolved in this forum. AT&T's program access Complaint should be denied.

II. BACKGROUND

The Programming. Ever since it started as a local origination channel, Channel 4 SD has always aired locally-originated, community-focused programming. This has remained its focus, even when Cox acquired the local distribution rights to the San Diego Padres regular season baseball games in 1997. The channel continued to build its local programming and has invested more than [**highly confidential****[redacted]****end**] since 1997 in building Channel 4 SD into the high-quality locally-oriented cable channel it is today. In fact, as it has grown, Channel 4 SD has continued to sharpen its community focus and deepen its community roots.[5]

Today, Channel 4 SD is a community channel, offering a diverse array of local news, public affairs, entertainment, and sports programming. Indeed, while Channel 4 SD has been portrayed as a regional sports network, the truth is that non-sports programming comprises the majority of Channel 4 SD's programming. Channel 4 SD provides an outlet for large quantities of locally-themed and locally-produced content that significantly enhances the quality and

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[5] *See* Declaration of Craig Nichols, ¶ 2 ("Nichols Decl.").

quantity of local entertainment and public affairs programming available to San Diegans.[6] Of course, sports programming is one important component of Channel 4 SD, and it is fortunate to have the exclusive rights for one major league baseball team, but it has no other exclusive sports programming, and it is mostly comprised of non-sports programming. Channel 4 SD carries a mix of local, regional, and national sporting events and sports entertainment programs to which it does not have exclusive rights. For example, Cox carries live game coverage of some men's and women's San Diego State University basketball games, which are typically available on the Mountain Sports Network and are fully available to AT&T. Channel 4 SD carries other non-exclusive local sports, such as high school football, on- and off-road auto racing, softball, youth baseball, lacrosse, and distance running.[7]

Channel 4 SD is also not the only option for local, regional, or national sports programming in San Diego. All games featuring San Diego's other major league sports team, the San Diego Chargers, air on other channels and are available to other MVPDs. Channel 4 SD also carries only a small amount of the major college sports programming (on a non-exclusive basis) from the two local universities, San Diego State University and the University of San Diego. Channel 4 SD also is not a dominant player in the distribution of regional sports programming. Southern California has two National Basketball Association teams (Los Angeles Lakers and Los Angeles Clippers), which are not carried on Channel 4 SD, and two National Hockey League teams (Los Angeles Kings and Anaheim Ducks), which also are not carried on

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6 *See id.* ¶ 3.

7 *See id.* ¶¶ 7-8.

Channel 4 SD. Channel 4 SD also does not have distribution rights for games involving Southern California's most popular college sports teams, such as USC and UCLA.[8]

Distribution of the Programming. Channel 4 SD is a terrestrially-delivered cable programming network. Its programming is delivered and distributed either by fiber optic cable or terrestrial microwave to several other wireline MVPDs and satellite master antenna television ("SMATV") operators throughout the San Diego market. Cox owns much of the necessary infrastructure, and where additional facilities are required to reach areas inaccessible to Cox's existing facilities, third-party-owned terrestrial facilities are readily available.[9]

Channel 4 SD always has been terrestrially-delivered for the simple reason that it is a local channel developed to serve local interests. There has never been any need to obtain the wider-area distribution potential offered by satellite for Channel 4 SD. Cox already owned much of the terrestrial fiber infrastructure necessary for distribution when it started the channel. The providers to which Cox has distributed Channel 4 SD always have had local receive facilities that are easily accessible. Simply put, Channel 4 SD is a local cable channel, distributed locally, and none of its local sports or other programming has been moved from satellite to terrestrial delivery[10]

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8 *See id.* ¶ 8.

9 *See id.* ¶ 9.

10 Cox's pre-existing ownership of the transmission facilities and the ready availability of terrestrial fiber and microwave facilities to reach places beyond Cox's facilities made it unnecessary for Cox to secure satellite distribution with its attendant expenses, which would have included significant outlays for transponder space on a satellite and uplink facilities to transmit the programming to the satellite. *See id.* ¶ 10.

AT&T Seeks To Piggyback On Cox's Investment In Local Programming. AT&T's national roll-out strategy for its U-verse service[11] is not designed to serve the needs and interests of viewers in its targeted localities. In fact, AT&T has resisted local municipalities' demands that it comply with California state laws requiring public educational and government channels and interconnection between neighboring cable systems.[12] Those disputes appear to be ongoing.

It is easy to understand why AT&T wants Channel 4 SD. In addition to eliminating one channel of programming that differentiates Cox as a competitive video programming choice for consumers, AT&T will attempt to use Channel 4 SD to remedy some of its neglect of local community interests. Obtaining Channel 4 SD would allow AT&T to offer community programming while making no investment of its own, doing nothing to encourage local community content production or development, and undermining Cox's unique offering to a community to which it is deeply committed.

Competition In The San Diego MVPD Market. Competition among MVPDs in the San Diego market has intensified greatly since Cox began delivering Channel 4 SD more than a decade ago, and today it is a highly competitive video market.[13] Consumers in all of Cox's

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11 Den Belson, *AT&T Is Calling to Ask About TV Service. Will Anyone Answer?*, N.Y. TIMES, July 3, 2006, at C1; Marguerite Reardon, *AT&T to Ramp Up IPTV's Expansion*, CNET News, Jan. 25, 2007, http://news.cnet.com/ATT-to-ramp-up-IPTVs-expansion/2100-1037_3-6153354.html?tag=nw.4; Dionne Searcey and Peter Grant, *Selling TV Like Tupperware*, WALL ST. J., June 29, 2006, at B1.

12 *See* Nichols Decl. at ¶ 11 & Exh. 2 (correspondence regarding AT&T refusal to offer PEG and interconnection).

13 *See* CoxCom, Inc., *Memorandum Opinion and Order*, 23 FCC Rcd 7106 (Med. Bur. 2008).

communities have several choices of service providers, including DBS providers Echostar and DirecTV, AT&T, and a number of smaller cable overbuilders and SMATV operators.[14]

The Commission recognized the robust competition in San Diego earlier this year when it granted Cox's Petition for Determination of Effective Competition covering all its San Diego-area communities.[15] As shown below, Cox has demonstrated that San Diego is a healthy competitive market, either because competitors exceed fifteen percent (15%) penetration or because local exchange carriers have entered the MVPD market.

III. LEGAL ANALYSIS

AT&T asserts that Cox engaged in unfair competition under Section 628(b) by denying AT&T access to Channel 4 SD in the San Diego market.[16] Section 628(b) requires AT&T to prove (1) that Cox committed unfair or deceptive acts (2) that had the purpose or effect of significantly hindering or preventing AT&T from providing satellite delivered programming.[17] AT&T's claim fails because it has not and cannot demonstrate either one of these elements as a matter of law.

First, Section 628(b) does not apply to denials of access to terrestrially-delivered programming, as the Commission has correctly and consistently ruled. AT&T clearly wants to change this rule, but an adjudication of a program access complaint under existing law is not the proper forum to do so. And second, even if there were any legal basis to force access to

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14 *See id.*

15 *See id.*

16 *See* Complaint ¶ 47.

17 *See DBS Review*, 15 FCC Rcd at 22806 ¶ 10.

terrestrially-delivered programming under Section 628(b) (which there is not), AT&T has not shown and cannot show that it would be entitled to such relief here.

A. Denial Of Access To Terrestrially-Delivered Programming Is Not An Unfair Or Deceptive Act Under Section 628(b).

Fundamental principles of statutory construction, the clear legislative history of Section 628(b), and every single Commission decision to address a denial of access to cable programming (and there have been several) confirm that while Section 628(b) prohibits denials of *satellite-delivered* programming, it does not require cable operators to provide competitors with *terrestrially-delivered* programming like Channel 4 SD.

1. Section 628 Does Not Apply To Distribution Of Terrestrially-Delivered Programming.

The Statutory Language. Section 628(b) reads as follows:

> It shall be unlawful for a cable operator [or] a satellite cable programming vendor in which a cable operator has an attributable interest . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing *satellite cable programming* . . . to subscribers or consumers.[18]

The Act defines "satellite cable programming" as "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers."[19]

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[18] 47 U.S.C. § 548(b) (emphasis added). The statute also proscribes unfair competition with respect to the distribution of satellite broadcast programming. *See id.* Section 628(i) defines satellite broadcast programming as "broadcast video programming . . . when such programming is retransmitted by satellite." *Id.* at § 548(i)(3). No such programming is at issue here.

[19] 47 U.S.C. §§ 548(i)(1), 605(d)(1).

The plain language of Section 628(b), which must be read together with the definitional sections of the same statute,[20] demonstrates that Congress intended Section 628(b) to address acts by cable companies or their affiliated satellite cable programming vendors that hinder the ability of competitors to obtain access to, and therefore to provide, satellite-delivered cable programming services controlled by the cable companies. The language addresses the control of (*i.e.*, access to) *satellite delivered programming*. Congress clearly and repeatedly limited the scope of Section 628 to "satellite delivered programming," using that phrase no fewer than eighteen times. It is elemental that the plain words of the statute must be given their natural meaning.[21]

In fact, there is no mention whatsoever in Section 628(b) of prohibiting acts that have the purpose or effect of hindering the provision of *terrestrially-delivered* cable programming services. If Congress had intended to reach such conduct, it easily could have done so. The decision of Congress not to include such express language must be given full effect. *See, e.g.*, *Association of American R.Rs. & Wisconsin Cent. v. Surface Transportation Board, et al.*, 162 F.3d 101 (D.C. Cir. 1998) (reversing Board's attempt to include displaced workers among category of "affected" workers based on statutory language indicating Congress meant to include

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[20] It is a fundamental principle of statutory construction that sections of the same statute must be read together. *See United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2336 (2007) ("Statutes must be read as a whole."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (explaining "the cardinal rule that a statute is to be read as a whole"); *Acree v. Republic of Iraq*, 370 F.3d 41, 52 (D.C. Cir. 2004) (same).

[21] *Microsoft Corporation v. AT&T Corp.*, 127 S. Ct. 1746, 1755 (2007) (construing provisions of a statute in "accordance with [their] ordinary or natural meaning") (quoting *FDIC v. Meyer*, 510 U.S. 471 476 (1994); *United States v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511, 1518 (2008) ("[t]he 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances.'") (quoting *Ardestani v. INS*, 502 U.S. 129, 135, (1991)); *Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

only workers who had been affirmatively severed); *American Bus Association v. Slater*, 231 F.3d 1 (D. C. Cir. 2000) (Department of Transportation's attempt to award money damages under ADA precluded by absence of authority under remedies provision of the statute).

AT&T, of course, would like to read the statute quite differently. AT&T would read Section 628 to forbid any cable operator practice that hinders significantly a competitor's ability to market its own service, because, after all, every wireline MVPD's service includes *some* satellite-delivered cable programming.[22] In other words, AT&T reads Section 628(b) to forbid Cox from competing in any way that might hinder significantly AT&T's ability to deliver its own service, merely because its service includes, for example, the SciFi Channel. And, AT&T appears to read Section 628(b)'s reference to "significantly hinder[ing]" a competitor to mean any competitive act that affects a competitor's ability to achieve its desired market share. Thus, AT&T reads Section 628(b) to be a sort of general insurance policy against *any* competitive conduct by cable operators, regardless of whether it involves a denial of access to satellite-delivered cable programming, terrestrially-delivered cable programming or, perhaps, is simply an effective promotion to potential consumers. Under AT&T's theory, any such conduct could constitute an unfair or deceptive practice under Section 628(b) merely because it might be effective in making it more challenging for AT&T to sell the "satellite-delivered programming" portion of its service, and the proof of hindrance would be whether the competitor might achieve a lower than expected (but unspecified) market share.

Nothing in Section 628(b) suggests such a broad application of the statute; to the contrary, the language makes clear that Congress intended to address denials of *satellite-*

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22 *See* Complaint ¶ 48.

delivered cable programming. AT&T's reading would untether the statute from its clear wording and purpose. When one party's reading of a statute is so stretched that it would lead to an absurd result, it does not create ambiguity, and it should not be credited. *See U.S. v. X-Citement Video*, 513 U.S. 64, 69-70 (U.S. 1994) ("Some applications of respondents' position would produce results that were not merely odd, but positively absurd.").[23] The statute's plain and unambiguous language makes clear that a viable Section 628(b) claim applies to *satellite-delivered* cable programming services and not to *terrestrially-delivered* cable programming services. Accordingly, that language must be given effect. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").[24]

The Legislative History of Section 628. In addition to the plain language of Section 628(b), the legislative history leaves no doubt whatsoever about congressional intent. Congress enacted Section 628 as part of the Television Consumer Protection and Competition Act of 1992.[25] Congress considered two versions of the statute, one that would have applied only to *satellite-delivered* cable programming services and one that would have applied to *all* cable

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[23] *See also Clinton v. City of New York*, 524 U.S. 417, 429 (U.S. 1998) ("Acceptance of the Government's new-found reading of § 692 'would produce an absurd and unjust result which Congress could not have intended.'") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)); *U.S. v. Wilson*, 290 F.3d 347 (D.C. Cir. 2002).

[24] *See also Estate of Colwart v. Nicklose Drilling Co.*, 505 U.S. 469, 476 (1992) (It is a "basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written."); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

[25] *See* Pub. L. No. 102-385, 106 Stat. (1992) (the "1992 Cable Act").

programming services.[26] As the Commission has explained, Congress resolved that conflict by adopting a statute that is limited to *satellite-delivered* cable programming services and does not apply to *terrestrially-delivered* cable programming services:

> The Senate version of the legislation that became Section 628 would have applied the program access provisions to all "national and regional cable programmers who are affiliated with cable operators." The House version, by contrast, expressly limited the provisions to "satellite cable programming vendor[s] affiliated with a cable operator." The Conference agreement adopted the House version with amendments. *Given this express decision by Congress to limit the scope of the program access provisions to satellite delivered programming, we continue to believe that the statute is specific in that it applies only to satellite delivered cable and broadcast programming.*

Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, 17 FCC Rcd 12124, 12158 ¶ 73 (2002) (the "*Sunset Order*") (citing *Section 628 Conference Report*).

The intent of Congress could not be more clear. In this particular piece of legislation, Congress sought to accomplish its goals by outlawing "unfair or discriminatory practices in the *sale of satellite cable and satellite broadcast programming*."[27] The scope and meaning of the statute cannot be expanded beyond that purpose to create a general, roving enforcement mechanism that requires cable operators to provide all their popular and competitive programming to other MVPDs, notwithstanding whatever one-sided policy arguments AT&T might offer. Congress did not intend such a statute.[28] Section 628(b) simply does not confer the

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[26] Report of the Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92, 102d Cong., Sess. 121 (1991) *with* H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 91-93 (1993) ("*Section 628 Conference Report*").

[27] Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *First Report and Order*, 8 FCC Rcd 3359, 3360, 3362 ¶¶ 1, 9 (1993) (emphasis added) ("*Program Access Order*").

[28] There is good reason for Congress to have rejected such an approach, as it recognized the value in encouraging cable operators to innovate and invest in new programming. 1992 Cable

authority on the Commission to force cable operators to provide competitors with terrestrially-delivered programming.[29]

Prior Commission Decisions. The Commission has repeatedly confirmed the foregoing analysis of the meaning and legislative history of Section 628(b) as foreclosing program access complaints seeking access to terrestrially-delivered programming like Channel 4 SD. As the Media Bureau recognized in *Everest*, the Commission has made clear that "[b]y its express terms, Section 628 of the Communications Act does not apply to terrestrially-delivered services."[30]

In fact, on three separate occasions, the Commission rejected claims essentially identical to the claim AT&T makes here, specifically holding that Section 628(b) cannot support a

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Act, § 2(b)(1), (2) (stating congress's policy objectives of "promot[ing] the availability to the public of a diversity of views and information through cable television and other video distribution media" and to "rely on the marketplace to the maximum extent feasible, to achieve that availability."). Moreover, the Commission itself has recognized that exhibiting a modest amount of regional sports programming can facilitate public knowledge of, interest in, and the likely success of new locally-oriented services like Channel 4 SD. *See RCN*, 14 FCC Rcd 17903 ¶ 23.

[29] It is axiomatic that "an administrative agency is a creature of statute, and can only act within the jurisdiction conferred by its enabling statute." *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 n.3 (3d Cir. 1981) (quoting Dickinson, *Administrative Justice and Supremacy of Law* 41 (1927)). *See Iowa Utils. Bd. v. Bell Atlantic Corp.*, 120 F.3d 753, 800, 803, 805-06 (8th Cir. 1997) (FCC regulations that exceeded the scope of the jurisdiction Congress granted the FCC are vacated); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) ("The FCC, like other federal agencies, 'literally has no power to act . . . unless and until Congress confers power upon it' " to do so) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)); *Southeastern Comm. College v. Davis*, 442 U.S. 397, 411-12 (1979) (agency lacks the authority to impose an obligation that is contrary to the clear meaning of its enabling statute); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979) (FCC cannot regulate unless Congress specifically authorizes such regulation); *Regents of Univ. Of Georgia v. Carroll*, 338 U.S. 586, 597-98 (1950) (FCC "must find its powers within the compass of the authority given it by Congress."). Any action beyond the scope of an agency's delegated authority is *ultra vires* and will be set aside. *Hi-Craft Clothing*, 660 F.2d at 916 n.3 (quoting Dickinson at 41).

[30] *See Everest*, 18 FCC Rcd at 26682 n.34 (citing *Sunset Order*, 17 FCC Rcd at 12158 ¶ 73).

competitor's claim that it is entitled to access to a cable operator's terrestrially-delivered programming. In *DirecTV* and *Echostar*, the two major direct broadcast satellite providers filed program access complaints against Comcast, asking the Commission to apply Section 628(b) to force the cable operator to allow them to distribute Comcast SportsNet, a terrestrially-delivered Philadelphia-area cable sports network.[31] Both times, the Media Bureau rejected the claim:

> In enacting Section 628, Congress determined that while cable operators generally must make available to competing MVPDs vertically-integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially-delivered.[32]

The Bureau based its determinations on the distinction made clear in both the plain language and in the legislative history of Section 628 between satellite-delivered programming, which is covered by the statute, and terrestrially-delivered programming, which is not.[33] But the Bureau went further and also drew clear limits on the potential scope of Section 628 by rejecting constructions of the statute that would foreclose competitive choices Congress left open to cable operators:

> Section 628(b) remains, as the Commission has stated previously, "a clear repository of Commission jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming." ***It cannot, however,***

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31 *See DirecTV*, 13 FCC Rcd at 21822; *Echostar*, 14 FCC Rcd at 2089.

32 *DirecTV*, 13 FCC Rcd at 21837 ¶ 32; *Echostar*, 14 FCC Rcd at 2102 ¶ 28.

33 *See DirecTV*, 13 FCC Rcd 21833-35 ¶¶ 24-25 & n.101; *Echostar*, 14 FCC Rcd 2098-99, ¶¶ 20-21 & n.86. In making this finding, the Commission cited the Supreme Court's directive that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *See DirecTV*, 13 FCC Rcd 21835 ¶25 & n.102; *Echostar*, 14 FCC Rcd 2099 ¶ 21 & n.87 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); *Tanner v. United States*, 483 U.S. 107, 125 (1987) ("[T]he legislative history demonstrates with uncommon clarity that Congress specifically understood, considered and rejected" other language.)).

> ***be converted into a tool that, on a per se basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate.***[34]

Thus, the Bureau confirmed that section 628(b) could not be stretched to cover denials of access to terrestrially-delivered programming because Congress had explicitly excluded such claims from the reach of the statute. AT&T cites the first sentence of this paragraph, reserving potential future applications of Section 628(b),[35] but conveniently ignores the last sentence of the paragraph, which unequivocally forecloses AT&T's claims because Congress deemed this conduct legitimate.

The Commission affirmed the Bureau's rulings that Section 628(b) could not support a complaint based on the denial of terrestrially-delivered programming. The Commission upheld the *DirecTV* and *Echostar* decisions *in toto*, *DBS Review Order*, 15 FCC Rcd at 22807 ¶¶ 12-13 (2000), and the D.C. Circuit affirmed the Commission.[36]

The fact that Congress has not altered the statute in light of the Commission's long line of rulings strongly indicates that Congress finds the agency's interpretation correct. *See Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 381 (1969) (It is a "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.").[37]

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[34] *Echostar*, 14 FCC Rcd at 2102-03 ¶ 29; *DirecTV*, 13 FCC Rcd at 21837-38 ¶ 33 (internal citation omitted) (emphasis added). *See also* Dakota Telecom, Inc. v. CBS Broadcasting, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 10500, 10507 ¶ 20 (Cab. Serv. Bur. 1999) ("*Dakota*").

[35] *See* Complaint ¶¶ 56-58.

[36] *Echostar Communications Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002). Only Echostar appealed the *DBS Review Order*.

[37] *See also Zemel v. Rusk*, 381 U.S. 1, 11 (1965) ("Under some circumstances, Congress' failure to repeal or revise in the face of such administrative interpretation has been held to

AT&T argues that this precedent is inapplicable because Cox's conduct makes it harder for AT&T to distribute satellite-delivered cable programming services to consumers who also want the terrestrially-delivered Channel 4 SD.[38] AT&T alleges that by making it more difficult for AT&T to market its product to this group of customers, Cox has violated Section 628(b). As shown above, that argument conflicts with the statutory language, the legislative history of Section 628(b), and with the plain intent of Congress. It must be rejected for that reason alone. Moreover, it raises an argument that was fully considered and rejected by the Commission in *DirecTV* and *Echostar*. There is simply no basis for AT&T to raise these claims anew.

AT&T's argument also ignores the reasoning and holding in *RCN*,[39] which is the third occasion on which the Commission rejected claims identical to AT&T's. RCN made the same argument AT&T makes here and in almost precisely the same terms – *i.e.* that Cablevision's "unfair denial of . . . terrestrially-delivered . . . programming violates Section 628(b) because without this programming in their line-up, [RCN's] satellite-delivered programming is less appealing to subscribers."[40] The Bureau rejected out of hand the notion that denying competitors access to terrestrially-delivered programming could violate Section 628(b) because it found that

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constitute persuasive evidence that that interpretation is the one intended by Congress."); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313 (1933) ("Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years."); *Costanzo v. Tillinghast*, 287 U. S. 341, 345 (1932) ("The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor.").

38 *See* Complaint ¶ 47.

39 *See RCN*, 14 FCC Rcd 17093, *aff'd on review, Memorandum Opinion and Order*, 16 FCC Rcd 12048 (2001) ("*RCN Review*").

40 *RCN*, 14 FCC Rcd at 17105 ¶ 24.

Congress had specifically declined to prohibit cable operators from making the competitive choice to limit distribution of terrestrially-delivered programming:

> In enacting Section 628, Congress determined that while cable operators generally must make available to competing MVPDs vertically-integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially-delivered . . . . Congress did not prohibit cable operators from delivering any particular type of service terrestrially . . . . Thus . . . we decline to find that, standing alone, Defendants' decision to deliver . . . programming terrestrially . . . and to deny that programming to Complainants is "unfair" under Section 628(b).

RCN, 14 FCC Rcd at 17105 ¶ 25.

The analysis and holding in *RCN* are irrefutable. The Bureau reasoned that a competitive choice that Congress specifically left available and lawful under the statute could not be treated as an "unfair act" under Section 628(b). In upholding that analysis, the Commission recounted RCN's argument that "in order to find a violation of Section 628(b), all that is required is that the 'purpose or effect' of the alleged conduct . . . significantly hinders or prevents an MVPD from providing satellite cable programming," and the Commission concluded that the Bureau's rejection of RCN's claim was correct.[41]

AT&T's claims are indistinguishable from those the Commission rejected in *DirecTV*, *Echostar* and *RCN*. AT&T concedes that Channel 4 SD is a terrestrially-delivered, rather than a satellite-delivered, cable programming channel.[42] Still, AT&T argues that Cox has significantly hindered AT&T's efforts to provide satellite-delivered programming services to San Diego viewers by denying access to Cox's terrestrially-delivered Channel 4 SD programming service.[43] AT&T claims that the service is so highly desired by San Diego customers that some will not

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41 *RCN Review*, 16 FCC Rcd at 12053, 12054 ¶¶ 15, 17.

42 *See* Complaint at ¶¶ 49-50.

43 *See id.*

purchase AT&T's satellite-delivered MVPD services unless Channel 4 SD is included.[44] The Commission rejected this exact argument in *DirecTV*, *Echostar* and *RCN*, in circumstances where the allegations of "must-have programming" and supposed cable operator misconduct were much stronger.

Indeed, the facts here are far less compelling for AT&T than the facts were for the MVPDs in *DirecTV*, *Echostar* and *RCN*. In *DirecTV* and *Echostar*, the DBS providers sought access to Comcast SportsNet, which had exclusive regional distribution rights for the city's Major League Baseball, National Hockey League, and National Basketball Association franchises, as well as a large amount of the major college sports programming in and around Philadelphia.[45] In *RCN*, moreover, the competitive cable operator sought access to terrestrially-delivered overflow programming from the Madison Square Garden Network and FoxSports/NY networks, which likewise held rights to most of the major sports programming in the New York regional market.[46]

In this case, Cox is not a dominant sports programming provider in the San Diego market. Cox has exclusive rights to the distribution of only one major sports team; the remainder of the programming is non-exclusive, and, in fact, most of the programming on Channel 4 SD is non-sports. There are numerous other channels available to AT&T carry popular sports programming of local and regional interest.[47]

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44 *See id.* at ¶¶ 47-50.

45 *See DirecTV*, 14 FCC Rcd at 21825-26 ¶¶ 7-10; *Echostar*, 14 FCC Rcd at 2092-92 ¶¶ 7-10.

46 *RCN Review*, 16 FCC Rcd at 12051 ¶¶ 7-8.

47 *See* Nichols Decl. ¶¶ 7-8.

Moreover, in *DirecTV*, *Echostar*, and *RCN*, either the terrestrially-delivered programming service itself or some of the key programming at issue had once been satellite-delivered, but allegedly had been "moved" to terrestrial delivery without a legitimate business purpose.[48] The complainants argued that Section 628(b) applied to the programming because it had once been satellite-delivered and the cable operators were evading the statute.[49] The Commission held that while conduct constituting an "evasion" of Section 628(b) might be encompassed within the statute if there was no legitimate business reason to distribute the programming terrestrially and satellite cable programming had been moved to circumvent the statute, that was not shown in those cases.[50] The Commission also made clear in each case that Congress did not intend Section 628(b) to reach terrestrially-delivered programming unless such a showing could be made.[51]

AT&T does not and could not make any such showing here. The undisputed fact is, Cox always has distributed Channel 4 SD terrestrially for legitimate business reasons, and neither Channel 4 SD nor the Padres programming were ever satellite-delivered cable programming. Indeed, there is no allegation that the service is being delivered terrestrially to evade application of the program access rules.[52] *DirecTV*, *Echostar* and *RCN* establish that denial of terrestrial

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48 *See See DirecTV*, 14 FCC Rcd at 21829-30 ¶¶ 15; *Echostar*, 14 FCC Rcd at 2093-94 ¶¶ 11-12; *RCN*, 14 FCC Rcd at 17103 ¶ 20.

49 *See id.*

50 *DBS Review*, 15 FCC Rcd at 22807 ¶ 13; *RCN Review*, 16 FCC Rcd at 12053 ¶ 15.

51 *See id.*

52 To the contrary, it is undisputed that Cox has developed Channel 4 SD as a local origination channel that is, and always has been, terrestrially delivered. *See* Nichols Decl. at ¶¶ 9-10. Cox decided that Channel 4 SD would remain terrestrially-delivered because it already owned or could more cheaply gain access to the distribution infrastructure it needed and there was no justification for the substantial cost that would be required to switch to satellite-delivered distribution. *See id.*

programming to competitors is a choice Congress left open to cable operators. Under this clear precedent, Cox's conduct cannot be prohibited by Section 628.

AT&T argues that these previous decisions authorize a finding against Cox here because the Commission has noted that Section 628(b) is a repository of authority to punish unfair competitive acts.[53] This is a nonsensical argument and ignores the Commission's previous statements specifically addressing AT&T's arguments in the program access context. AT&T neglects to mention that the Commission made those statements in *Echostar* and *DirecTV* – cases in which it was simultaneously rejecting the precise claims AT&T raises here.[54] Plainly, the Commission did not mean by such language to reverse the very rulings – that Section 628(b) does not apply to denials of terrestrially-delivered cable programming – it was making in the same cases. Moreover, AT&T ignores the fact that in all the terrestrially-delivered programming cases, the Commission acknowledged only that denying access *could* violate Section 628(b) *if* there were no legitimate business reason for the terrestrial distribution of the programming (and if it were specifically to evade the statute).[55] As shown above, there is no such allegation here; Channel 4 SD is and always has been terrestrially-delivered for legitimate reasons.

Finally, as the Commission has held, "Section 628(b) may not, without more, be invoked against conduct that is lawful under another provision of the Communications Act."[56] It is clear that Congress intended that cable operators may lawfully deny competitors access to terrestrially-

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53 Complaint ¶¶ 49, 56-57.

54 *Echostar*, 14 FCC Rcd at 2102-03 ¶ 29; *DirecTV*, 13 FCC Rcd at 21837-38 ¶ 33 (internal citation omitted) (emphasis added). *See also Dakota*, 14 FCC Rcd at 10507 ¶ 20.

55 *See DBS Review*, 16 FCC Rcd at 12053 ¶ 15.

56 *Everest*, 18 FCC Rcd at 26683-84 ¶ 10 (citing American Cable Company and Jay Copeland v. Telecable of Columbus, Inc., *Memorandum Opinion and Order*, 11 FCC Rcd

delivered programming under Section 628 because "[b]y its express terms, Section 628 . . . does not apply to terrestrially-delivered services."[57] On at least three separate occasions, the Commission has confirmed that cable operators may lawfully deny competitors access to terrestrially-delivered programming services like Channel 4-SD.[58] AT&T does not argue that any *other* statute or rule expressly requires Cox to make Channel 4 SD available to competitors.[59]

Because AT&T fails to identify any other statutory mandate that requires Cox to make terrestrially-delivered programming available, the Commission's precedent forecloses AT&T's claim that withholding such programming is an unfair practice. Simply put, it cannot be unfair to do what Congress permitted as lawful.[60] Since AT&T cannot and does not contest that Cox's conduct is otherwise permitted by the Act and the Commission's rules, AT&T cannot establish an unfair or deceptive act, or, therefore, a violation of Section 628(b). AT&T's Complaint must be dismissed.

10090, 10117 para. 61 (Cab. Serv. Bur. 1996) ("*Jay Copeland*")); *Dakota*, 14 FCC Rcd at 10507 ¶ 21.

57 *Everest*, 18 FCC Rcd at 26682 n.34 (citing *Sunset Order*, 17 FCC Rcd at 12158 ¶ 73).

58 *See Everest*, 18 FCC Rcd 26681-82, 83-84 ¶¶ 5-7, 10; *DirecTV*, 13 FCC Rcd 21822 at 21834-35 ¶ 25 & nn. 101-102, *Echostar*, 14 FCC Rcd at 2099 ¶ 21 & nn. 86-87, *consolidated and aff'd on review*, *DBS Review Order*, 15 FCC Rcd at 22807 ¶¶ 12-13; *RCN*, 14 FCC Rcd at 17106, ¶ 21, *aff'd on review*, *RCN Review Order*, 16 FCC Rcd at 12053 ¶ 15.

59 As described below, AT&T argues that a number of other statutes indicate that the Commission should take a more expansive view of its authority under Section 628(b), but AT&T does not allege that any of those statutes include any language that requires Cox to make terrestrially-delivered programming available to competitors. Indeed, AT&T disavows any argument that the Commission should read Section 628(c), which generally requires cable operators to provide competitors with access to satellite delivered programming [in certain circumstances], *see* 47 U.S.C. § 548(c), to prohibit Cox's conduct here. Complaint ¶ 50.

60 *Echostar*, 14 FCC Rcd at 2102-03 ¶ 29; *DirecTV*, 13 FCC Rcd at 21837-38 ¶ 33; *Everest*, 18 FCC Rcd at 26683-84 ¶ 10 (citing *Jay Copeland*, 11 FCC Rcd at 10117 para. 61); *Dakota*, 14 FCC Rcd at 10507 ¶ 21.

2. Controlling Distribution Of Channel 4 SD Is Not An Unfair Practice.

AT&T relies primarily on the Commission's *MDU Order* to argue that denial of Channel 4 SD is an unfair practice, arguing that it announces an expansion of Commission authority under Section 628(b).[61] In that case, the Commission adopted a rule prohibiting cable operators from entering into exclusive contracts to serve properties with multiple dwelling units ("MDUs") and other real estate developments. The Commission determined that exclusive contracts were an "unfair practice" under Section 628(b) primarily because such contracts "effectively prohibit" new entrants from reaching an entire class of customers, making competition impossible and market entry less likely.[62] In describing its view of the authority conferred by Section 628(b), the Commission noted that it may proscribe any acts that "unfairly *deny* MVPDs the *ability* to provide [satellite] programming to consumers."[63]

AT&T's reliance on the *MDU Order* is misplaced. First, AT&T's argument goes too far. The *MDU Order* does not overrule the long line of cases holding that denials of terrestrially-delivered programming are not prohibited under Section 628(b). The *MDU Order* was not a case involving a denial of cable programming at all. Every single one of the Commission's cases involving a denial of cable programming makes clear that Section 628(b) does not apply to terrestrially-delivered cable programming. The *MDU Order* does not even mention these cases,

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61 *See* Complaint ¶¶ 52-55, 59, 61-62. The *MDU Order* is on appeal to the D.C. Circuit. *See* National Cable & Telecommunications association, *et al.*v. Federal Communications Commission, Nos. 08-1016, 08-1017 (filed Jan. 16, 2008). Final briefing in that case was completed on September 19, 2008, and it remains to be seen whether this reading of Section 628(b) is permissible. In any event, the outcome of that appeal has no bearing on this case because, among other reasons, the conduct involved there is different in type from the denial of programming involved here and in the long line of cases beginning with *EchoStar* and *DirecTV*.

62 *See MDU Order*, 22 FCC Rcd at 20237, 20249, 20255, 20256 ¶¶ 4, 27, 43, 44.

63 *Id.* at 20256 ¶ 44 (emphasis added).

let alone purport to overrule them. And there was no need to do so. The *MDU Order* deals with an entirely different issue – the complete exclusion of competitive MVPDs from any opportunity to serve certain groups of customers – not the denial of access to cable programming.

This is an important distinction. The analysis of whether Congress intended a denial of terrestrially-delivered cable programming to be prohibited under Section 628(b) is different from the analysis of whether other conduct might be prohibited as unfair or deceptive. As the Commission has recognized, Congress understood that competing MVPDs might not have access to terrestrially-delivered programming when it enacted Section 628, and it deliberately limited the statute so that denials of terrestrially-delivered cable services were still lawful.[64] Analyzing whether other types of conduct may be prohibited under Section 628(b) does not affect that clear congressional intent or the Commission's prior conclusion that denial of terrestrial programming is specifically permitted by the statute.

Despite the Commission's previous rulings, AT&T seeks to apply the language in the *MDU Order* expansively, effectively overruling its long line of authority specifically and directly addressing denials of terrestrially-delivered cable services, and asks the Commission to rule that a denial of terrestrially-delivered programming is an unfair practice under Section 628(b).[65] This would mean that any conduct that "impairs" an MVPD from selling its services could be "unfair" under Section 628(b), which, as shown above, would read the distinction between terrestrially-delivered and satellite-delivered programming out of the statute despite the clear intent of Congress to make that distinction. The *MDU Order* certainly does not suggest that Section

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64 *See Sunset Order*, 17 FCC Rcd at 12158 ¶ 73 (citing *Section 628 Conference Report*, *supra*).

65 Complaint ¶¶ 61-62.

628(b) may be used to render unlawful a competitive choice that Congress deemed lawful, and it does not overrule prior law.

Second, even considering the principle underlying the *MDU Order* – that certain exclusionary conduct might be prohibited as an unfair act under Section 628(b) – Cox's conduct still would not be an unfair act. AT&T argues that without Channel 4 SD it is unlawfully "impaired" from serving customers who want Channel 4 SD,[66] but AT&T does not and cannot claim that Cox's conduct excludes AT&T from serving any customers in the San Diego area or anywhere else. This case involves a denial of access to *one channel*, not the complete exclusion of MVPD competitors from residential areas or apartment buildings.[67] AT&T is still competing for customers. Some of those customers may have preferences concerning certain programming, but the conduct at issue here does not "prohibit" or "deny" AT&T the opportunity to serve those or any other customers. If anything, it encourages AT&T to differentiate its own programming from other MVPDs' programming through investment and innovation, rather than by government mandate, and it encourages investment-based competition.

3. The Other Statutes AT&T Cites Provide No Basis For Expanding The Scope Of Section 628(b).

AT&T implores the Commission to invoke various provisions of the Act to expand its authority under Section 628(b) somehow to allow it to encompass terrestrially-delivered

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66 *See id.* ¶ 55.

67 AT&T claims that the lack of access to Channel 4 SD makes AT&T's programming service marginally less attractive to what appears to be a very small subset of San Diego households, *see* Complaint ¶¶ 60, 63, though, as described below, AT&T's proffered evidence falls far short of proving even that modest proposition.

programming.[68] None of those provisions can change the language or the meaning of the statute, and none can provide the authority AT&T seeks to create.

First, AT&T claims that Section 628(a) gives the Commission the authority to reach terrestrially-delivered programming because AT&T may be forced to exit the market if it is not granted access to Channel 4 SD, and Section 628(a) instructs the Commission to "promote the public interest . . . by increasing competition and diversity" in the MVPD market.[69] This is wrong for several reasons. Even if it were true that AT&T might exit the market (which is highly unlikely[70] and not established by AT&T's own filing[71]), it would not trigger new powers under Section 628(a). Section 628(a) is a non-specific provision and does not provide the Commission with any more authority than that expressly granted by Section 628(b). The general language of Section 628(a) provides no basis for overriding the explicit language of Section 628(b).[72] It is also well settled that a statute's purposes clause does not expand the authority

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68 Complaint ¶¶ 78-83.

69 *See* Complaint ¶¶ 68-70 (citing 47 U.S.C. § 548(a)).

70 AT&T argues that the Commission should consider it an at-risk competitor. At least in the effective competition context, Congress believed the opposite when it last looked at the issue and enacted the LEC test, which presumes that LECs will be exceptionally robust competitors. *See* Telecommunications Act of 1996, Pub. L. No. 104-104 Sec. 301(b)(3), 110 Stat. 56, 115 approved Feb. 8, 1996, *codified at* 47 U.S.C. § 543(*l*)(1)(D) (the "1996 Act").

71 None of the market penetration data AT&T provides even remotely suggests that AT&T is so handicapped in San Diego (as compared to its other markets) that withdrawal from the market is likely. AT&T is bringing additional competition and diversity to a marketplace already teeming with competing providers, and no evidence suggests that AT&T will cease providing service.

72 AT&T's argument that the non-specific provisions of Section 601 of the Act, which ask the Commission to encourage competition and diversity, fail for the same reasons. *See* Complaint ¶ 71 (citing 47 U.S.C. § 521(4), (6)). Under accepted canons of statutory construction, Congress would have expected its specific instructions in Section 628(b) to prevail over general admonitions. *See, e.g., Gozlon-Peretz v. United States*, 498 U.S. 395 (1991) (a specific provision controls over one of a more general application).

granted by the substantive provisions of the law.[73] And, of course, this reading of Section 628(a) would render meaningless the specific provisions of Section 628(b), its legislative history, and the long line of Commission rulings holding that denials of terrestrially-delivered programming are not prohibited under the statute.

Second, AT&T cites Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 (note).[74] Section 706 is another general provision that empowers the Commission to adopt "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[75] AT&T claims that Section 706 empowers the Commission to expand the scope of Section 628(b), but it cites no case or Commission authority for that proposition. Again, such general provisions cannot override specific statutory language or the clear intent of Congress that Section 628(b) apply only to denials of satellite-delivered programming. The Commission did mention Section 706 very much in passing in the *MDU Order*, but the Commission's decision in that case did not hold that Section 706 expands the reach of Section 628(b) to encompass denials of access to terrestrially-delivered programming.[76]

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[73] *See* 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 20:12 (6th ed. 2002) ("The policy section like the preamble is available for the clarification of ambiguous provisions of the statute, but may not be used to create ambiguity.") (citing *Block v. Hirsch*, 256 U.S. 135, 154 (1921); *Council of Hawaii Hotels v. Agsalud*, 594 F. Supp. 449 (D. Haw. 1984); *Thillens, Inc. v. Fryzel*, 712 F. Supp. 1319 (N.D. Ill. 1989); *Francocnia Associates v. U.S.*, 43 Fed. Cl. 702 (1999), *aff'd*, 240 F.3d 1358 (Fed. Cir. 2001), *reh'g and reh'g en banc denied*, (June 12, 2001) *and rev'd on other grounds*, 536 U.S. 129 (2002)).

[74] *See* Complaint ¶ 72.

[75] 1996 Act § 706 (codified at 47 U.S.C. § 157 note).

[76] AT&T is also wrong that the general purposes of the 1996 Act support its construction of Section 628(b). AT&T argues that the Commission's well-settled interpretation of Section 628(b) "unfairly tilt[s] the playing field in favor of the cable incumbents, allowing them to benefit from Congress's market-opening objectives without contributing to the same end."

Third, AT&T's ancillary authority argument[77] should be rejected because the Commission already has specifically rejected it in the program access context, and AT&T offers no basis for a different outcome here. In the *RCN Review*, the Commission explicitly held that because "[Section] 628 does not by its terms apply to terrestrially-delivered programming, it is not appropriate for the Commission to exercise ancillary jurisdiction to extend, in the context of a complaint proceeding, program access regulation to terrestrially-delivered programming."[78]

4. Expanding Section 628(b) Through This Adjudication Would Be Inappropriate.

This adjudication is not a proper forum for the Commission to reverse its long line of cases holding that Section 628(b) does not apply to terrestrially-delivered cable programming. Whether the Commission even has the authority to extend the program access rules to terrestrially-delivered programming is a question currently pending in a rulemaking proceeding.[79] In fact, in its recent *Program Access NPRM*, the Commission recognized that its current rules under Section 628 do *not* apply to terrestrially-delivered programming and sought comment on whether the statute would permit such an expansion of the rules.[80] The Commission received public comments on the issues, which are under consideration. The parties to this case

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AT&T Complaint ¶ 31. The 1996 Act did not address program access at all, and it did not create any special rights regarding access to programming for telephone companies entering the MVPD market.

77 *See* Complaint ¶¶ 78-83.

78 *See RCN Review*, 16 FCC Rcd at 12055 ¶ 18.

79 *See Program Access NPRM*, 22 FCC Rcd at 17860-61 ¶¶ 116-117 (2007).

80 *See id.*

filed comments in that proceeding, predictably taking opposing positions on the authority and the advisability of the Commission changing the rules under Section 628(b).[81]

Cox and other cable operators have relied on the Commission's reading of Section 628(b) for many years, and there were many public policy reasons for Congress to limit Section 628(b) to terrestrially-delivered programming and for the Commission to implement that intention through its rulings. Congress consistently has recognized the importance of encouraging the development of terrestrially-distributed local and regional programming services. For example, Section 2(a)(10) of the 1992 Cable Act states that "[a] primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation."[82] The Commission has also been a champion of this important public policy, creating exemptions from Commission rules and even authorizing programming exclusivity on a case-by-case basis in order to promote it.[83] In this context, it is clear why local and regional programming services that transmit their programming terrestrially were never included within the program access law.

In any event, any authority of the Commission to revise its interpretation of Section 628(b) is particularly constricted here because the Commission has reviewed Section 628(b) many times and has never found any ambiguity that would permit it to apply the program access

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81 *See* Comments of AT&T Inc., MB Docket No. 07-198 (filed Jan. 4, 2008); Reply Comments of Cox Communications, Inc., MB Docket No. 07-198 (filed Feb. 12, 2008).

82 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Sec. 2(a)(10), 106 Stat 1460 (1992).

83 *See* In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 - Horizontal and Vertical Ownership Limits, *Second Report and Order*, 8 FCC Rcd 8565, 8599 ¶ 78 (1993) (creating an exemption from the vertical programming cable channel occupancy rules for local and regional services as a means of encouraging continued MSO investment in local programming).

rules to terrestrially-delivered programming. Where the Commission previously has found a statute to be clear and unambiguous, it has a high burden to explain why its view of the text has changed, or it will be reversed for manufacturing an ambiguity in the statute. *City of Dallas v. FCC*, 165 F.3d 341, 353 (5th Cir. 1999) ("Because we believe the Commission has ignored plain text and has attempted to manufacture an ambiguity in order to obtain an increased level of judicial deference, we invalidate the rule imposing an effective competition.").

Moreover, where an agency departs from its settled interpretation of an ambiguous statute, (and the statute here is not ambiguous), it still must supply a reasoned analysis for the change beyond the explanation required when an agency acts in the first instance. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–42 (1983). Here the Commission would have the added burden of explaining how a statute that has not been amended means something different now than it has meant for many years.

Indeed, the Commission's interpretation of Section 628(b) as excluding terrestrial cable programming is more than a decade old and has been affirmed by the D.C. Circuit, and Congress has not revised the statute or indicated any objection. Where Congress has not intervened to correct a long-standing interpretation of a statute, that is evidence that the interpretation was correct.[84]

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[84] *See Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 381 (1969) (It is a "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction."); *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) ("Under some circumstances, Congress' failure to repeal or revise in the face of such administrative interpretation has been held to constitute persuasive evidence that that interpretation is the one intended by Congress."); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313 (1933) ("Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years."); *Costanzo v. Tillinghast*, 287 U. S. 341, 345 (1932) ("The failure of Congress to alter or amend the section, notwithstanding this consistent construction by

Finally, given the clarity of the statute and legislative history, and the Commission's own statements regarding the plain language and legislative intent of Section 628(b), it is clear that the Commission's interpretation of Section 628(b) was and is correct. While AT&T would like to change the rules now, it is important to note the Supreme Court's admonition in *MCI Telecomm. Corp. v. AT&T Corp.*, that the FCC cannot make "basic and fundamental changes in the scheme created by" Congress.[85] As the Court instructed in that case, leaving aside whether a "fundamental revision of the statute . . . . may be a good idea," it is not within the agency's power.[86]

B. AT&T Cannot Demonstrate That The Purpose Or Effect Of Denying Access To Channel 4 SD Is To Hinder Significantly Or Prevent AT&T From Providing Satellite Cable Programming To Consumers.

As shown above, withholding terrestrially-delivered cable programming does not and cannot be an unfair method of competition or an unfair or deceptive act or practice under Section 628(b). That, alone, should end the inquiry and require dismissal of AT&T's program access complaint. But there is another, independent reason that AT&T's claim must fail: AT&T cannot satisfy the second element under Section 628(b) because Cox's denial of access to Channel 4 SD has not had the purpose or effect of hindering significantly or preventing AT&T from providing satellite cable programming to its subscribers.

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the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor.").

85 512 U.S. 218, 231 (1994).

86 *Id.* at 231-32.

1. AT&T's Argument That Denial Of Popular Programming Itself Demonstrates An Improper Purpose Is Inadequate As A Matter Of Law.

AT&T argues that Cox's conduct violates the improper "purpose or effect" prong of Section 628(b) because declining to license Channel 4 SD to a telecommunications company and to DBS video providers demonstrates that "Cox is acting deliberately . . . to stifle such competition."[87] AT&T points out that Cox "trumpets its exclusive access to Padres programming in advertising" and that Cox licenses Channel 4 SD to other providers with whom Cox does not compete directly, while denying it to AT&T.[88]

AT&T's argument fails as a matter of law. Cox's decision not to license Channel 4 SD to AT&T is nothing more and nothing less than a lawful competitive choice. Even if everything AT&T says about Cox's marketing were true, there is absolutely nothing improper about it.

As shown above, Cox's compliance with the law (and every construction of it at the legislative, Commission and judicial levels) negates the first element under Section 628(b) – *i.e.*, the denial of terrestrially-delivered cable programming cannot be an unfair method of competition or an unfair or deceptive act or practice under the statute.

But the lawfulness of such conduct also is relevant to the second element in this case. AT&T cannot rely on Cox's lawful decision to deny access to terrestrially-delivered cable programming to satisfy its burden of proving that Cox's decision had an improper *purpose* under the same statute. Congress deliberately left the decision to deny terrestrially-delivered cable programming beyond the reach of the statute,[89] but AT&T's argument would bring it back in.

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87 Complaint at ¶¶ 39-46, 65-66.

88 *Id.*

89 *See Dakota*, 14 FCC Rcd at 10507, ¶ 20 (citing *Echostar*, 14 FCC Rcd at 2102-03 ¶ 29).

AT&T argues that the "purpose" requirement is satisfied merely by showing that certain conduct was intended to cause a substantial number of customers to select Cox's service over AT&T's service.[90] That, of course, would define almost any lawful competitive conduct (promotions, lowering prices, free services, new channels, better customer service, etc.), and it would convert every act taken by a competitor that might cost AT&T customers into a violation of Section 628(b). This makes no sense. The argument also conflicts with the plain language of Section 628(b). The statute says that the "purpose" must be to "*hinder* significantly or *prevent*" an MVPD from providing satellite cable programming to consumers.[91] If Congress meant to outlaw basic and otherwise lawful acts of competition – if a mere competitive purpose were sufficient – Congress could have and would have said so.

Moreover, AT&T's "evidence" of an improper purpose is insufficient, even if taken at face value. The fact is, San Diego is a highly competitive market for video programming. Cox competes with other MVPDs in multiple product markets, striving to gain customers in video, voice, data, and, increasingly, wireless services. DBS programmers' penetration has grown substantially,[92] and telecommunications companies bring the enormous natural advantage of an entrenched and dependable customer base to the video marketplace. In this fiercely competitive environment, each competitor seeks to differentiate its service offerings, and there are many

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90 *See* Complaint ¶¶ 63-66.

91 47 U.S.C. § 538(b) (emphasis added).

92 *Compare Adelphia Order*, 21 FCC Rcd at 8270 (citing 2004-2005 Nielsen data indicating 9.5% DBS penetration) *with* http://www.tvb.org/rcentral/markettrack/Cable_and_ADS_Penetration_by_DMA.asp (chart illustrating Nielsen data regarding cable and DBS penetration as of July 2008 indicating DBS penetration of 12%).

ways to do so. Some focus on customer service, others on developing popular or unique programming, and others on community services. Cox does all three, and more.[93]

As AT&T well knows, differentiating service offerings based on exclusive programming, and marketing that fact ("trumpeting"), are acts of lawful competition. Channel 4 SD is one example of Cox's efforts to differentiate its video product to connect with San Diego customers, but it is neither the largest nor the most common example.[94] The best-known MVPD product differentiator is DirecTV's NFL Sunday Ticket package.[95] DirecTV touts its Sunday Ticket exclusivity and uses it aggressively as a marketing tool in competition with cable operators and its other competitors.[96]

AT&T not only is aware of this, but also recently announced that it will partner with DirecTV in markets where AT&T has not yet deployed its U-verse video, voice and data service.[97] AT&T plans to market DirecTV's video service as part of its bundled service offerings, taking advantage of DirecTV's exclusive access to the Sunday Ticket package.[98] Surely AT&T does not believe its decision to use (and, presumably, to market) the exclusivity of Sunday Ticket as a competitive tool in many markets demonstrates an improper purpose. Its

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93 *See* Nichols Decl. ¶¶ 2-5, 13.

94 *See id.* ¶ 2.

95 *See* http://www.directv.com/DTVAPP/global/contentPageNR.jsp?assetId=900044.

96 DirecTV always has acknowledged that it uses NFL Sunday Ticket as a "programming differentiator" that "sets [DirecTV] apart from [its] competition." See Barry Wilner, *Picture-perfect: the NFL's television future is bright, starting with the newly launched NFL Network*, FOOTBALL DIGEST (Dec, 2003) (quoting former Vice Chairman of DirecTV, Eddy Hartenstein), available at http://findarticles.com/p/articles/mi_ m0FCL/ is_4_33/ai_110312195.

97 *See* Todd Spangler, *AT&T Switches to DirecTV: Deal Leaves Dish Network Without Major Reseller Partner*, MULTICHANNEL NEWS, Sept. 29, 2008, available at http://www.multichannel.com/CA6600006.html.

98 *See id.* Verizon has made essentially the same deal to market DirecTV and Sunday Ticket in markets where it has not deployed its FiOS broadband service.

decision shows that AT&T recognizes the value of programming exclusivity and that it is committed to leveraging exclusivity where the law permits.

In fact, AT&T utilizes exclusivity agreements in other areas where it can differentiate its products from those of its competitors, including Cox. For example, AT&T has an exclusive deal with Apple to be the mobile service provider for the iPhone.[99] All customers who would prefer to take video, voice, data, and wireless services from a single provider and want to have an iPhone have no choice but to take service from AT&T.

AT&T also has concluded a number of exclusive programming deals that permit it to distribute content unavailable to its competitors. For example, AT&T provides a mobile multichannel video service called AT&T Mobile TV that can be accessed only using AT&T mobile phones.[100] The service utilizes Qualcomm's MediaFlo technology, and includes two programming services – PIX, a service that includes Sony Pictures movies, and CNN Mobile Live – that are available only through AT&T.[101] Some of AT&T's other exclusive programming arrangements involve exclusive access to wireless video content, such as World Wrestling Entertainment programming, March Madness NCAA basketball, and Olympics coverage.[102]

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99 *See* Leslie Cauley, *AT&T: We're All About Wireless*, USA TODAY, July 31, 2008, available at http://www.usatoday.com/money/industries/telecom/2008-07-31-att-iphone-stephenson-apple_N.htm (explaining that AT&T will be the exclusive iPhone service provider until 2010).

100 *See* Peter Svensson, *AT&T Launches TV Service on New Phones, Rivaling Verizon*, May 1, 2008, available at http://abcnews.go.com/Technology/GadgetGuide/wireStory?id=4761967.

101 *See id.*

102 Press Release, AT&T, AT&T'S Wireless Unit Tag Teams With WWE (Mar. 8, 2007) (available at http://www.fiercemobilecontent.com/node/3001); Press release, AT&T Tips Off NCAA March Madness with Exclusive Mobile Access to NCAA Basketball Action (Mar. 12, 2008) (available at http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25325); Press Release, AT&T to Provide 'All-Access Pass' to the 2008 Olympic Games Via

Plainly, Cox's use of Channel 4 SD as a product differentiator in the San Diego market is a standard competitive practice, not an example of unfair competition.

Finally, there is no evidence whatsoever that Cox's decision to distribute Channel 4 SD terrestrially was improper. Cox conceived and developed Channel 4 SD from its origins as a local origination channel to a popular local programming network. Cox sought through Channel 4 SD to maximize its local community presence in the San Diego market. It has invested over **[highly confidential***[redacted]***end]** over the past twelve (12) years to demonstrate its commitment as a long-term corporate citizen of the community, dedicated to providing quality programming of interest to the local community.[103] Accordingly, Cox never needed to expand delivery of Channel 4 SD to non-local viewers via satellite. Cox chose terrestrial delivery of Channel 4 SD for legitimate business reasons of cost and convenience. The infrastructure for the local network and its delivery systems already were terrestrial, and there was no need to incur the significant added expense of satellite delivery.[104]

Sweeping Extensive Three-Screen Agreement with NBC Universal (July 16, 2008) (available at http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25961). As part of AT&T's Olympics deal, AT&T also received exclusive right to distribute songs produced by popular artists 3 Doors Down, Sheryl Crow, Lady Antebellum, and Nelly *via* its wireless music service. *See Top Acts Offer Exclusive Olympic Songs Via AT&T*, BILLBOARD, July 7, 2008, available at http://www.billboard.com/bbcom/news/article_display.jsp?vnu_content_id= 1003825084.

103. *See* Nichols Decl. ¶ 2.

104 *See id.* ¶¶ 9-10. Applying Section 628(b) to prohibit Cox's conduct despite its showing of a valid business purpose for terrestrial delivery would violate not only Commission precedent, but D.C. Circuit precedent as well. In *Echostar v. Federal Communications Commission*, the D.C. Circuit ruled that a valid business reason for a programmer's decision to utilize terrestrial delivery "necessarily precluded holding" that a violation or evasion of the program access rules took place. 292 F.3d at 755 (D.C. Cir. 2002).

Moreover, Cox settled on a distribution strategy for Channel 4 SD nearly a decade before AT&T even considered entering the MVPD market.[105] Cox began providing Channel 4 SD to wireline cable providers and other small operators in San Diego at the Channel's inception, and it has not deviated from that policy.

2. AT&T Has Not Shown And Cannot Show That Denial Of Access To Channel 4 SD Has The Effect Of Significantly Hindering Or Preventing AT&T From Providing Its Own Programming.

AT&T also fails to satisfy the final element of a Section 628(b) claim. AT&T has offered no reliable evidence – or even any unreliable, but probative evidence – that its lack of access to Channel 4 SD has caused it any competitive harm, let alone that it is "significantly hindering or prevent[ed]" AT&T from providing its own service to consumers. Of course, merely showing that some customers have selected Cox over AT&T is insufficient to demonstrate this element, which requires proof that AT&T's ability to provide service has been "significantly hinder[ed] or prevent[ed]."

AT&T has not and cannot make this showing. AT&T has filled its complaint with "surveys" and statistics that purport to show that Channel 4 SD is "must-have" programming and that AT&T's sales have been all but blocked. But nearly every aspect of the data AT&T uses is flawed. The data is incomplete, selective and unreliable, and the surveys are unsound, biased and unsubstantiated. There is not a shred of independent, reliable data upon which the Commission could rely to draw the conclusions AT&T wishes to make. Moreover, even if these fatal flaws were overlooked, the numbers simply do not demonstrate that the lack of access to

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105 *See* Nichols Decl. ¶¶ 9-10.

Channel 4 SD is having or is likely to have any meaningful impact on AT&T's ability to sell its services in San Diego.

Finally, AT&Ts reliance on the *Adelphia Order* is misplaced. The presumptions concerning Channel 4 SD in that order are inaccurate and several years old now. The San Diego market is changed and highly competitive. Ironically, AT&T's "surveys," if they can be used at all, demonstrate that Channel 4 SD is *not* "must-have" programming in San Diego.

(a) AT&T's Sales And Churn Data Is Incomplete, Internally Contradictory, And Fails To Demonstrate That AT&T Is Hindered Significantly Or Prevented From Providing Its Own Programming.

AT&T first seeks to show that it is competitively harmed without Channel 4 SD by comparing its customer penetration and churn figures to the same figures in other self-selected AT&T U-verse markets.[106] However, AT&T compares its San Diego market penetration and customer churn figures only to [**highly confidential*** ***end**].[107] There is no explanation for this. AT&T identifies no characteristic of its [**highly confidential *** *** end**] that would establish these few markets as the only relevant point of comparison for its San Diego sales and churn rates or why its other markets around the country are not comparable. In fact, Cox competes with AT&T in markets outside AT&T's [**highly confidential *** ***end**], including, among others, [**highly confidential*** ***end**]. There is no reason to exclude these or other potentially relevant markets from AT&T's comparative analysis; AT&T offers no explanation for omitting them. This incomplete and unexplained approach is the first of many examples of

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106 *See* Complaint ¶¶ 34-35 & Sambar Decl. ¶¶ 10, 11.

107 *See id.* [**highly confidential***end**]. *See* Sambar Decl. ¶ 10.

the selective use of data controlled by AT&T. Reliable conclusions simply cannot be drawn from such a flawed approach.

On a substantive level, there is no evidence whatsoever that AT&T's customer sales and churn rates are unusual for its first year in the market. AT&T launched U-verse in San Diego on June 4, 2007, so it has been in the video business there only a little more than a year.[108] It is far more reasonable to conclude that AT&T's customer uptake and churn has been relatively volatile and unpredictable during the period of new market entry than it is to presume that any differences are due to the lack of access to Channel 4 SD. AT&T's facile comparison of its introductory period in San Diego to presumably non-introductory periods in its [**highly confidential*** ***end**], without any explanation as to why the results should be similar or attempt to control for the external differences between these markets, is inherently unreliable and misleading.

But even if AT&T's [**highly confidential*** *** end**] were the sole appropriate measuring stick, and even if the incomplete and unreliable sales and churn rate comparisons were considered valid (for argument's sake), the purported differences between San Diego and these markets are [**highly confidential*** ***end**]. AT&T claims that its sales rate has been negatively affected by lack of access to Channel 4 SD.[109] Specifically, AT&T claims that its sales rate in San Diego is [**highly confidential*** ***end**] than its sales rates in its other [**highly confidential*** *** end**].[110] But AT&T's monthly sales rate in San Diego is only [**highly confidential*** ***end**] which is [**highly confidential*** ***end**] lower than its sales

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108 Complaint ¶ 15.

109 Complaint ¶ 34 & Sambar Decl. ¶ 10.

110 *See id.*

rate in its other markets in the [**highly confidential*** ***end**].[111] These sales rates are [**highly confidential*** ***end**] but in fact such a comparison is misleading. AT&T seeks to assign great weight to a sales volume differential [**highly confidential*** ***end**]. This is not a legally sufficient basis for finding that lack of access to Channel 4 SD is significantly hindering or preventing AT&T's provision of service in San Diego.

Indeed, these superficial comparisons and conclusions demonstrate why the other problems with AT&T's methodology – *e.g.*, the unexplained, incomplete and selective use of markets; the unfair and unexplained comparison of new entry data to data for presumably [**highly confidential*** ***end**]; and, as described below, the failure to use independent experts; the failure to explain the methodology; the incredibly small sample sizes – are so important.

AT&T's churn rates also fail to show [**highly confidential*** ***end**] between San Diego and its other [**highly confidential*** ***end**] (again assuming those markets were the proper comparison). First, it is unclear what AT&T actually claims its churn rate to be. In Exhibit 1, of the Sambar Declaration, AT&T reports [**highly confidential*** ***end**] from [**highly confidential*** ***end**]. In Exhibit 7 of the Sambar Declaration, however, AT&T claims the rate for that same time period was [**highly confidential*** ***end**]. This small difference is significant because the basis for AT&T's statistical argument rests entirely on the difference between the alleged churn rate in San Diego and the alleged churn rate in its other [**highly confidential*** *** end**], which AT&T claims is [**highly confidential*** ***end**].[112]

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111 *See id.*

112 *See* Complaint ¶ 35 & Sambar Decl. ¶ 11.

The difference between these two churn rates is no more than [**highly confidential*** ***end**] in any case. And if the smaller churn figure were correct, then the difference between San Diego and the other [**highly confidential*** ***end**] is [**highly confidential*** ***end**] which [**highly confidential*** ***end**] than AT&T asserts.

AT&T has the burden of proof in this proceeding, and it is not entitled to a presumption that its inconsistent and incomplete numbers are accurate, but even indulging that presumption, the [**highly confidential*** ***end**] in churn rates between San Diego and AT&T's other [**highly confidential*** ***end**] could just as easily be attributed to the fact that AT&T is still a new video services provider in San Diego as it could to the unavailability of Channel 4 SD.

In fact, even the limited data set upon which AT&T relies supports the inference that AT&T's churn rate is [**highly confidential*** [113] ***end**] Indeed, the [**highly confidential*** ***end**] was more than [**highly confidential*** ***end**] than the [**highly confidential*** ***end**] churn rate.[114] Thus, if these numbers were to be credited at all, the [**highly confidential*** ***end**] demonstrates that AT&T's churn rate likely will continue to [**highly confidential*** ***end**] in the San Diego market. And that appears to be occurring *even without Channel 4 SD*. AT&T's churn rates therefore do not provide any foundation for a finding that lack of access to Channel 4 SD is increasing churn and thereby hindering significantly AT&T's efforts to penetrate the San Diego market.[115]

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113 *See* Sambar Decl. Exh. 7.

114 *See id.*

115 AT&T also claims that a portion of its pre-service cancellations are attributable to the absence of Channel 4 SD. Complaint ¶ 35. AT&T, however, does not claim that its pre-service cancellation rate is any higher in San Diego than the same rate in any of its other markets. One can only presume, given AT&T's efforts to provide comparative market data for sales and churn rates where it might appear to be helpful (as flawed as that data might be), that AT&T elected

(b) AT&T's Survey Data Is Inherently Unreliable And Fails To Demonstrate That AT&T Is Hindered Significantly Or Prevented From Providing Its Own Programming

Next, AT&T presents various survey data it claims shows that a substantial percentage of San Diego customers are less likely to sign-up for, and more likely to cancel, U-verse service because Channel 4 SD is not included.[116] AT&T presents data from four surveys: two "ePanels" of AT&T's existing customers across all its business lines in San Diego; one survey of exiting customers conducted by AT&T's own "save team," (the 'Save Team Survey") and one survey of potential new customers conducted by a few members of AT&T's own door-to-door sales force.[117]

All of AT&T's survey data suffers from multiple methodological flaws that render it unreliable and useless. Even if AT&T's survey data were taken at face value, however, it would not demonstrate that AT&T is hindered significantly or prevented from providing its service due to the lack of access to Channel 4 SD.

The most obvious and independently fatal flaw in AT&T's survey data is that none of the surveys were conducted by independent qualified experts. The ePanels appear to have been designed, carried out, and analyzed by AT&T's own Customer Analytics and Research Department;[118] the Save Team Survey was conducted by AT&T's internal "save team,"[119]

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not to make the comparison for a reason. Perhaps it would show that San Diego's order cancellation rate is no higher than its order cancellation rate in its other markets.

116 *See* Complaint ¶¶ 31-33, 34, 36.

117 *See id.*

118 *See id.* ¶¶ 31-33.

119 *See id.* ¶ 36.

apparently a part of its customer service department; and the "potential new customer" survey was conducted by AT&T's door-to-door salespeople.[120]

It is well established that for surveys to be considered reliable evidence, they must be independently conducted and analyzed by competent experts.[121] All of AT&T's survey evidence fails this threshold test; it was all conducted by in-house AT&T employees with no demonstrated expertise in designing, conducting, or analyzing survey data. They were neither independent nor claimed to be expert, and the surveys should be disregarded for this reason alone.

In addition, AT&T's surveys fail to reflect that they followed any proper methodology. The Commission consistently rejects survey evidence that fails to demonstrate adherence to reasonable, professional methodological standards.[122] Courts also consistently reject survey

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120 *See id.* ¶ 34.

121 *See, e.g., Lutheran Mut. Life Ins. Co. v. United States*, 816 F.2d 376, 378 (8th Cir. 1987) ("To establish the trustworthiness of a survey, it must be shown…that the persons conducting the survey were experts…"); *Hodgdon Powder Co. v. Alliant Techsystems, Inc.*, 512 F. Supp. 2d 1178, 1182 (D. Kan. 2007) (finding a survey was not objective because, among other reasons, the survey was conducted by the plaintiff's employees); *Sandoz, Ltd., Master Builders v. Omware, Inc.*, 1993 U.S. App. LEXIS 33948 (9th Cir. 1993) (lower court should not have considered a "survey [that] was not independently conducted by an expert to ensure trustworthiness."); *Floorgraphics, Inc. v. News Am. Mktg. In-Store Servs.*, 546 F. Supp. 2d 155, 179 (D.N.J. 2008) ("A survey 'must be conducted with proper safeguards to insure accuracy and reliability.' These include the following…the persons conducting the surveys must be experts . . . the survey must be conducted independently of the attorneys involves in the litigation . . .); *Hodgdon Powder Co. v. Alliant Techsystems, Inc.*, 512 F. Supp. 2d 1178, 1182 (D. Kan. 2007) (finding a survey was not objective because, among other reasons, the survey was designed by plaintiff's counsel).

122 *See, e.g.*, XM Satellite Radio Holdings, Inc., *Memorandum Opinion and Order and Report and Order*, 23 FCC Rcd 12348, 12371 ¶¶ 44-47 (2008) ("*XM Merger Order*"); BellSouth Corporation, et al., *Memorandum Opinion and Order*, 13 FCC Rcd 20599, 20627 ¶¶ 35-39 (1998) ("*BellSouth Louisiana 271 Order*").

evidence that is not demonstrated to be methodologically sound.[123] AT&T's survey evidence fails on this basis, because all four surveys **[highly confidential*** ***end]**

In any case, even a brief examination of the surveys themselves shows that they were not based on any coherent and reliable methodological foundation and therefore should be rejected. Some of the more obvious methodological flaws are these:

- **[highly confidential*** ***end]**
- **[highly confidential***;[124] ***end]**
- **[highly confidential***;[125] ***end]**
- **[highly confidential***.[126] ***end]**

In addition to these obvious "thumbs on the scale," the **[highly confidential*** ***end]** 2008 "Customer Preference Surveys" and **[highly confidential*** *** end]** suffer from natural bias created by **[highly confidential***[127] ***end]** San Diego had 450,691 occupied households according to the 2000 Census.[128] **[highly confidential*** ***end]** of the potential households in San Diego. The 2007 "Customer Preference Survey" is based on a pool of **[highly**

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123 *See, e.g., Ky. Res. Council, Inc. v. EPA*, 467 F.3d 986, 997 (6th Cir. 2006) (upholding EPA decision that a survey was unreliable because it did not indicate the geographic location of the universe, how participants were chosen, the response rate, or other information regarding the methodology); *Rust Env't & Infrastructure v. Teunissen*, 131 F.3d 1210, 1218 (7th Cir. 1997) (survey discounted because it was not shown to be methodologically sound).

124 *See* Sambar Decl. Exhs. 2, 4.

125 *See id.*

126 *See id.* Exh. 4.

127 **[highly confidential*** ***end]**.

128 *See* Profiles of General Demographic Characteristics: 2000 Census of Population and Housing, California, U.S. Census Bureau, issued May 2001, at 899, available at http://www.census.gov/prod/cen2000/index.html. San Diego County, which both Cox and AT&T serve, has 994, 677 occupied housing units.

confidential * ***end**][129] The 2008 "Customer Preference Survey" is based on [**highly confidential*** *** end**] of 132 respondents,[130] or at most 0.029% of the potential respondent pool. Courts have rejected sample pools of such small size, and the Commission should do so here.[131]

In addition to these fundamental methodological flaws, each survey viewed individually shows a thorough lack of rigor. [**highly confidential*** [132] ***end**] The Save Team data includes [**highly confidential*** ***end**]

The Save Team data is also incomplete and highly biased because it consists of [**highly confidential***[133] ***end**]

AT&T offers no information at all on these important questions. [**highly confidential*** ***end**] In short, the "Save Team Survey" provides no reliable or probative information to the Commission about why AT&T's customers cancelled their service, either before or after they signed up.

The door-to-door sales survey suffers from all the same defects as the "Save Team Survey," and adds a few more.[134] **[highly confidential*** ***end]** In the end, AT&T's claim

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129 **[highly confidential***. ***end]**

130 Complaint ¶ 31.

131 *United States v. Campa*, 459 F.3d 1121, 1131-1132 (11th Cir. Fla. 2006) (the court rejected a survey for, among other reasons, using an inadequate sample size (only 0.002% of eligible jurors)); *Johnson v. Big Lots Stores, Inc.*, 2008 U.S. Dist. LEXIS 35316, 54-55 (E.D. La. Apr. 29, 2008) (rejecting sample size of 1.75% of the total population) (citing *Reich v. So. Md. Hosp., Inc.*, 43 F.3d 949, 951 (4th Cir. 1995) (rejecting testimony from only 1.6% of the total employee population in overtime pay case as insufficient)).

132 *See* Sambar Decl. Exh. 6.

133 Sambar Decl. ¶¶ 9, 26.

134 *See* Sambar Decl. Exh. 5.

that [**highly confidential*****.[135] *****end**] Like the "Save Team Survey," the results of the door-to-door salesperson survey must be rejected.

AT&T's "ePanel" survey data also shows a number of additional, fundamental flaws. First, AT&T's "ePanels" suffer from significant sample bias. [**highly confidential*****.[136] [137] [138] *****end**] That is precisely the type of arrangement that the Commission and the courts have found unreliable and rejected.

In this case, [**highly confidential***** [139] *****end**]

AT&T provides no basis for accepting the results [**highly confidential***** *****end**] Thus, if there are legitimate reasons for [**highly confidential***** *****end**] in a survey purporting to assess the importance of baseball programming, AT&T fails to explain them.

Finally, although the Commission should not credit any of AT&T's data, even if it were taken as accurate, AT&T's conclusions do not follow, and they certainly do not establish a violation of the statute. At most, AT&T has provided data suggesting that a [**highly confidential***** [140] *****end**] No one would consider any of these networks to be "must-have"

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135 *See Sambar* Decl. Exh. 5.

136 *BellSouth Louisiana 271 Order*, 13 FCC Rcd at 20627 ¶ 37 (recognizing inherent sample bias in survey pool composed of persons responding to newspaper and magazine advertisements). *See also* Payne of Virginia, Inc., *Decision*, 60 FCC 2d 484 (1976) (relying on self-selected calls from listeners to survey issues of importance to larger community is unreliable methodology).

137 *See, e.g.*, Friends *of the Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815, 826 (8th Cir. 2006) (before relying on survey results, must analyze the potential for bias and adjust data based on any bias found).

138 *See* Sambar Decl. ¶ 5.

139 *Compare* Sambar Decl. Exhs. 2, 4 *with* Gender 2000, U.S. Census Bureau, issued September 2001, at 6, available at www.census.gov/prod/2001pubs/c2kbr01-9.pdf.

140 *See id.* Exh. 4.

programming. And, between 2007 and 2008, the **[highly confidential*** [141] ***end]** Again, these figures simply do not reliably demonstrate that **[highly confidential*** ***end]** San Diego viewers consider Channel 4 "must-have" programming.

Moreover, according to AT&T's survey data, **[highly confidential*** [142] ***end]**

It is reasonable to assume that AT&T has provided the strongest available evidence that Channel 4 SD is "must-have" programming in San Diego, but even that data does not bear out the story AT&T wants to tell. In sum, AT&T has provided the Commission with **[highly confidential*** ***end]**

AT&T nevertheless asks the Commission to use this data to find Cox in violation of the Act and to fine it **[highly confidential*** .[143] ***end]**

Under Commission and judicial standards, AT&T's showing falls far short of satisfying a program access complaint under Section 628(b).

(c) Channel 4 SD Is Not "Must-Have" Programming in San Diego.

AT&T's Complaint also fails to demonstrate competitive harm because its argument that Channel 4 SD is "must-have" programming necessary to competition in San Diego is simply false.[144] Channel 4 SD is an important part of Cox's commitment to cable viewers and the community of San Diego. The reason for this is not that Channel 4 SD is a regional sports network – because it is not. The reason is that Channel 4 SD has always been and continues to be a local, community-oriented channel, dedicated to the interests of San Diego viewers.

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141 *Compare* Sambar Decl. Exh. 2 *with* Exh. 4.

142 *See id.*

143 *See* Complaint ¶ 96.

144 *See id.* ¶¶ 38, 46.

Channel 4 SD is by no means the key to competition in the provision of sports or any other programming in the San Diego market.

AT&T has ample opportunity to compete for San Diego sports viewers, and lack of access to Channel 4 SD simply does not impede its ability to succeed in the market. AT&T also has ample opportunity to dedicate resources for the development of a channel on its own platform to locally-themed entertainment shows such as those found on Channel 4 SD. For example, Channel 4 SD carries a number of locally-themed entertainment shows such as *Sam the Cooking Guy* (a local cooking show), *Brain Wave* (a local high school quiz show), *So You Made a Movie* (which showcases short films produced by San Diegans), and *Forefront* (which highlights successful San Diegans and unlocks the secrets to their success).[145] Channel 4 SD also carries several programs that concentrate on local issues of public concern, such as *Shades of San Diego*, a weekly program that highlights diversity in the community, *San Diego Insider*, the region's only regularly scheduled news magazine program, and *A Salute to Teachers*, an annual program honoring the best of San Diego's educators.[146]

Through these programs, Cox demonstrates its commitment to the San Diego community and ensures that Cox's relationship with San Diego remains positive for the company and the community. Indeed, without Channel 4 SD, much of this programming probably would have no outlet at all.[147]

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145 *See* http://www.4sd.com/4SD_New/. Details about all Channel 4 SD's local programming is available from the channel's website.

146 *See id.*

147 *See* Nichols Decl. ¶ 4. Cox's commitment to the San Diego community goes beyond providing Channel 4 SD. Cox donates advertising time to help generate awareness of community events like the San Diego Film Festival, the San Diego Pride Parade, the city's Cinco de Mayo festival, the Little Italy Art Walk, the Mother Goose Parade, Oceanside Harbor Days, and others. Cox also provides assistance for non-profit organizations in San Diego, including the

Channel 4 SD does have sports programming. Since 1997, Channel 4 SD has had exclusive local distribution rights for most regular-season San Diego Padres programming. In addition, Channel 4 SD carries a mix of local, regional, and national sporting events and sports entertainment programs to which it does not have exclusive rights. For example, Cox carries live game coverage of men's and women's San Diego State University basketball games. These games typically also are available on the Mountain Sports Network, which is available to all MVPDs, including AT&T. Other Channel 4 SD sports programming includes high school football, on- and off-road auto racing, softball, youth baseball, lacrosse, and distance running. Overall, however, the total amount of Channel 4 SD sports programming comprises less than half of programming shown on Channel 4 SD.[148]

Boys and Girls Club of San Diego, Family Health Centers of San Diego, the San Diego Blood Bank, the Red Cross, the San Diego Food Bank, the Marine Corps Toys for Tots program, and many others. Cox's service to the city also includes free cable service to more than 450 schools and free Internet service to more than 60 community center public computer labs, ensuring wide public access to broadband Internet service. Cox also takes an active role in improving educational institutions and opportunities in San Diego. The Cox Kids Foundation has donated $355,000 in Innovation in Education grants to public and charter middle and junior high schools and has also donated $362,000 since 1999 to Cox Heroes Scholarships, which are awarded to individuals overcoming personal challenges to pursue educational advancement in the San Diego area. The Cox Kids foundation also donates time and resources to the Rady Children's Hospital Speech and Hearing Center, including nearly $315,000 in grants for speech therapy, hearing aids and hearing tests for newborns, and it works with the Make a Wish Foundation of San Diego to provide computers, free set-up, and complimentary Internet service for children with life threatening medical problems. Cox also shows its dedication to San Diego families through its work with the Center for community Solutions, Casa de Amparo, and Voices for Children to provide aid to victims of domestic violence and abuse. In addition, Channel 4 SD itself sponsors the Matt Vasgersian Charity Poker Tournament, which raises money for two local non-profit organizations, the Fallen Officers Fund and Tender Loving Canines. Moreover, during Black History Month, Hispanic Heritage Month, and Asian Pacific Islander Month, Cox runs public service announcements highlighting the leaders of these communities in San Diego. *See id.* at ¶ 5 & Exh. 1.

[148] *See id.* ¶¶ 2, 7.

Channel 4 SD is not the only option for local, regional or national sports programming in San Diego. It has the rights to the regular season games of one local professional sports team. But all of the games featuring San Diego's other major league sports team, the San Diego Chargers, air on channels other than Channel 4 SD that are available to all other multichannel video program distributors ("MVPDs") in the market. Likewise, Channel 4 SD carries only a small amount of the major college sports programming from the two local universities, San Diego State University and the University of San Diego on a non-exclusive basis. Thus, while Cox carries men's and women's San Diego State University basketball games, these games are also available to AT&T through the Mountain Sports Network.[149]

Just as Channel 4 SD is not a dominant local sports provider, it also is not a major player in the distribution of sports programming of regional interest. Southern California has two National Basketball Association teams – the Los Angeles Lakers and the Los Angeles Clippers. None of their games are carried on Channel 4 SD. Likewise, Southern California has two National Hockey League teams – the Los Angeles Kings and the Anaheim Ducks. None of their games are carried on Channel 4 SD, either. Channel 4 SD also does not have distribution rights for games involving Southern California's most popular college sports teams, such as USC and UCLA.[150]

Thus, Channel 4 SD is not fairly described as a "regional sports network," because it does not have a sizeable portion of the most popular local, regional and national sports programming in a particular region. Channel 4 SD is fortunate to have the programming for one major league baseball team, but it has no other exclusive sports programming, and it is mostly comprised of

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149 *See id.* ¶ 7.

150 *See id.*

non-sports programming.[151] But this is simply not enough to classify Channel 4 SD as a "must-have" network for a competitor to succeed in the San Diego video marketplace.

(d) AT&T Cannot Rely Upon The *Adelphia Order* To Demonstrate That AT&T Is Hindered Significantly Or Prevented From Providing Its Own Programming.

Finally, AT&T seeks to show competitive harm by relying on findings in the *Adelphia Order* that the presence of a regional sports network in San Diego was depressing DBS competition based on 2004-2005 data. AT&T's reliance on that order fails for several reasons.

First, the *Adelphia Order* analysis was based on information that is now several years old. The *Order* presumed that Channel 4 SD was a regional sports network and was, therefore, "must-have" programming. That presumption was never accurate, and, as demonstrated above, it certainly is not accurate today. The majority of the programming on Channel 4 SD is not sports-related.[152] AT&T tried and failed to show that Channel 4 SD is "must-have" programming in fact. If anything, AT&T's Complaint and this Answer have tested the assumptions in the *Adelphia Order* and proven them false.

Second, new information has become available since the *Adelphia Order* that undermines the assumption that the unavailability of Channel 4 SD could be distorting competition in the San Diego MVPD market. For example Nielsen DMA data for 2007 shows that DBS penetration in San Diego has jumped nearly 27% higher than the 2004-2005 data the Commission used in the *Adelphia Order*, from 9.5% to 12%.[153] Growth of that magnitude by providers *without Channel*

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151 *See id.* ¶¶ 2,7.

152 Nichols Decl. ¶ 3.

153 *Compare Adelphia Order*, 21 FCC Rcd at 8270 (citing 2004-2005 Nielsen data) *with* http://www.tvb.org/rcentral/markettrack/Cable_and_ADS_Penetration_by_DMA.asp (chart illustrating Nielsen data regarding cable and DBS penetration as of July 2008).

4 SD shows a healthy competitive market, not one stunted by the unavailability of "must-have" programming.

Third, since the *Adelphia Order*, the Commission has recognized that MVPD competition in San Diego is thriving, which the Commission recognized earlier this year when it granted Cox's Petition for Effective Competition.[154] Indeed, competition among MVPDs in the San Diego market has intensified greatly since Cox began delivering Channel 4 SD more than a decade ago.[155] Cox serves twenty-seven (27) cable communities in and around San Diego, which included a total of 763,516 occupied households as of the 2000 Census.[156] Viewers in each of those communities now may choose to take service from a number of competitors, including DBS providers Echostar and DirecTV, AT&T, and a number of smaller cable overbuilders and SMATV operators.[157]

In *CoxCom*, Cox demonstrated that its San Diego-area franchise communities – which include portions of the City of San Diego and San Diego County – satisfy the standards for effective competition established by Congress in Section 623(*l*) of the Act.[158] Under the statutory system Congress enacted, that determination by the Commission meant that Cox was subject to effective competition in the covered areas, and therefore relieved Cox of a number of

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154 *See* CoxCom, Inc., *Memorandum Opinion and Order*, 23 FCC Rcd 7106 (Med. Bur. 2008) ("*CoxCom*").

155 *See* Petition for Determination of Effective Competition of CoxCom, Inc. d/b/a Cox Communications San Diego, CSR Nos. 7768-E, 7769-E, 7770-E, filed January 28, 2008 ("Cox Petition"). Indeed, nearly all the franchising authorities in Cox's cable communities provided letters supporting Cox's Petition, confirming that local government officials consider the cable market in San Diego to be highly competitive. *See* CoxCom, 23 FCC Rcd 7106 n.3.

156 *See*Cox Petition, Exh. 2 (Census data for Cox cable communities).

157 *See CoxCom*, 23 FCC Rcd at 7107-08 ¶¶ 5-6.

158 *See id.* at 7108, 7109 ¶¶ 9, 12.

regulations that Congress originally had designed to control cable operators when cable was unconstrained by competition.[159]

Cox also demonstrated with real data that San Diego is a healthy competitive market. Cox showed that fifteen of its franchise areas – including more than half the households Cox serves in the market – are located in municipalities where market penetration attained by competitors exceeds fifteen percent (15%), the threshold Congress set for "competing provider" effective competition.[160] The remainder of Cox's franchise areas were granted effective competition status under the LEC Test,[161] which Congress established in recognition of the strong competitive position from which local exchange carriers start when they enter the MVPD

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159 *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at paras. 39-49 (1993) ("*Rate Order*"); *First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking*, 9 FCC Rcd 1164 at para. 26 (1994); *Third Order on Reconsideration*, 9 FCC Rcd 4316 at para. 7 (1994). *See also* 47 C.F.R. § 76.905(a); 47 U.S.C. § 533(a)(3) (MMDS and SMATV cross-ownership restrictions are inapplicable where effective competition is present); *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 187-92 (D.C. Cir. 1995) (tier buy-through and uniform rate requirements are inapplicable where effective competition is present); Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *Memorandum Opinion and Order*, 11 FCC Rcd 20206 (1996); Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues, *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598 ¶ 102 (2001) (cable operator subject to effective competition may place broadcast signals on upper service tiers).

160 *See* 47 U.S.C. § 543(*l*)(1)(B) (the "Competing Provider Test"). DBS penetration, combined with competition from other wireline cable operators and SMATV providers satisfied the Competing Provider Test in Unincorporated San Diego County (including Whispering Palms, San Diego County, Ramona, San Diego Country Estates, Rancho San Diego, Pine Valley, and Jamul), Vista, Solana Beach, San Marcos, Poway, Oceanside, National City, Escondito, Encinitas and Chula Vista. These communities included 407,938 occupied households as of the 2000 Census. *See* Cox Petition Exh. 2.

161 *See* 47 U.S.C. § 543(*l*)(1)(D) (the "LEC Test"). Cox communities where LEC Test effective competition exists include San Diego City (South and Central), Imperial Beach, La Mesa, Lemon Grove, El Cajon, and Santee, California. The communities where effective competition was granted based on the LEC Test included 355,578 households as of the 2000 Census. *See* Cox Petition Exh. 2.

market. On this basis, Congress established a legal presumption that, as soon as LECs like AT&T decide to enter a market and begin providing service, effective competition must exist.[162] In San Diego, therefore, AT&T's market entry was sufficient to establish effective competition in the market. Thus, the San Diego market has reached the point where Congress determined that less – not more – government intervention is needed.

San Diego has all the hallmarks of a robustly competitive MVPD market. In San Diego, as in other markets, programming is only one of the many factors that customers consider in choosing among competing service providers. Providers also compete on the basis of service reliability, price, and customer service. Most service providers now offer video packages containing hundreds of channels, almost all of which are available from all major competitors. This likely makes the availability of single programming channels less important to customers than issues like customer service.

The Commission's determination of effective competition for Cox's franchise areas in San Diego is starkly at odds with the Commission's analysis of the San Diego market in the *Adelphia Order*.[163] In the *Adelphia Order*, the Commission performed a highly theoretical regression analysis and concluded that lack of access to Channel 4 SD was depressing DBS subscribership in San Diego.[164] The Commission reiterated these findings in the *Program Access Order and NPRM*.[165] The Commission's decision to grant effective competition, on the other hand, was based on *real data from ground level in San Diego*. The Commission's recent

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162 *See* 47 U.S.C. § 543(*l*)(1)(D).

163 Adelphia Communications Corporation, *Memorandum Opinion and Order*, 21 FCC Rcd 8203 (2006) (the "*Adelphia Order*").

164 *See id.* at 8267-72 ¶¶ 140-51, 8341-50 Appendix D.

165 *See Program Access Order and NPRM*, 22 FCC Rcd at 17817 ¶ 39.

acceptance of this data and its decision that the market is subject to effective competition updates the Commission's previous view that lack of access to Channel 4 SD was depressing video competition there.

At the very least, AT&T cannot rely on the *Adelphia Order* to create a presumption of competitive harm in this case when AT&T's own data has failed to make the case.

Cox's San Diego cable system has dedicated itself to effective competition by efficiently delivering the highest quality service at the lowest possible price. Unique local programming like Channel 4 SD is one piece of the high quality service Cox provides in San Diego. Like AT&T's efforts to differentiate its products and services in the marketplace, Cox's development and distribution of Channel 4 SD is a garden-variety competitive practice and violates no law or Commission rule. AT&T does not need access to Channel 4 SD to compete, so denial of the programming cannot constitute a violation of Section 628(b).

IV. AT&T'S REQUEST FOR DISCOVERY IS BASELESS.

AT&T devotes only a single sentence to its request for discovery, claiming that "much of the relevant evidence in this case is in Cox's possession."[166] AT&T fails, however, to identify even a single piece or category of "relevant evidence" that would be probative if the Commission granted discovery. Indeed, in the very next paragraph, AT&T asks the Commission to act "swiftly" because "[t]he key facts are straightforward and indisputable."[167] Plainly, AT&T does not feel discovery is required, and has not made a case for discovery.

Discovery would be inappropriate in this case in any event. AT&T has raised a single claim, which the Commission has seen before and consistently rejected over several years as

166 Complaint ¶ 88.

167 *Id.* ¶ 89.

contrary to the statute. There is simply no basis in Section 628(b) or in any prior Commission decision for AT&T's proposition that Cox can be held liable for withholding the terrestrially-delivered Channel 4 SD. This is a question of law, and if that question is determined in Cox's favor, AT&T's claims must fail. As shown above, that legal question should be determined in Cox's favor, even if every fact alleged by AT&T were assumed to be true. Granting discovery would subject both Cox and AT&T to needless expenditure of time and resources on factual discovery that is not germane to the controlling issue in this case.

Moreover, even if AT&T's legal proposition were valid, there still would be no basis for discovery in this particular case. AT&T has control of information regarding its own services, the competitive market, and the alleged harm to its ability to provide services, and Cox's denial of access to Channel 4 SD is not in dispute. Indeed, AT&T has provided a good deal of information on the issues it apparently felt needed explication. Cox has shown that AT&T's arguments cannot succeed as a matter of law, and this is not the type of case where discovery could change the analysis. Instead, it would simply authorize a pointless fishing expedition and delay the proceedings. Accordingly, the Commission should not order discovery in this proceeding.

V. THE COMMISSION SHOULD DISMISS AT&T'S REQUESTS FOR DAMAGES AND PENALTIES.

AT&T also requests damages and penalties, seeking to punish Cox for conduct that the Commission repeatedly has declared lawful under the plain language and legislative history of

Section 628 in an uninterrupted line of decisions dating back ten years.[168] These requests should be dismissed out of hand.

First, Cox's conduct is entirely lawful, as shown above, and the complaint – along with all the requests for relief – should be dismissed on the merits.

Second, even if there were any valid legal basis for the claim in this case (which there is not), there certainly is no basis to impose damages and penalties on Cox for its conduct. If the Commission were to find in AT&T's favor, it would have to reverse the long line of cases in which it held that denials of terrestrially-delivered cable programming are not prohibited under Section 628(b), including its decisions in *DirecTV*, *Echostar*, and *RCN*. The Commission would have to adopt a new construction of Section 628(b), explaining how its view of the statutory language and legislative history had changed, and why, and it would have to justify its complete reversal on the law.[169]

Under these circumstances (even assuming the statutory language would permit such a ruling), it would be error to apply such a new rule retroactively.[170] Where a clear rule is reversed

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168 Most recently the Commission's reaffirmed that rule of flaw in the *Program Access NPRM*. 22 FCC Rcd at 17859-61 ¶¶ 115-117.

169 AT&T's repeated claims that the Commission always has foreseen applying Section 628(b) in the manner it suggests here is directly contradicted by the Commission's specific rejection of Section 628(b) claims identical to AT&T's in *DirecTV*, *Echostar*, and *RCN*. *See See DirecTV*, 14 FCC Rcd at 21829-30 ¶¶ 15; *Echostar*, 14 FCC Rcd at 2093-94 ¶¶ 11-12; *RCN*, 14 FCC Rcd at 17103 ¶ 20; *DBS Review*, 15 FCC Rcd at 22807 ¶ 13; *RCN Review*, 16 FCC Rcd at 12053 ¶ 15.

170 The Supreme Court long ago held that the harm from retroactive application must be weighed against the harm of producing a result that is "contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery*, 332 U.S. 194, 203 (1947). The D.C. Circuit has explained that the retroactive application of an agency decision "boil[s] down to...a question of concerns grounded in notions of equity and fairness." *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (quoting *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 n.6 (D.C. Cir. 1987)). See *also Clark-Cowlitz*, 826 F.2d at 1081 (stating that "a retrospective

in an adjudication and one party has detrimentally relied on the old rule, retroactive application of the new rule is unlawful.[171] As the D.C. Circuit has held:

> The governing principle is that when there is a "substitution of new law for old law that was reasonably clear," the new rule may be given prospective-only effect in order to "protect the settled expectations of those who had relied on the preexisting rule.[172]

Thus, the Commission may not award damages or penalties for Cox's conduct, which has comported fully with all previous constructions of Section 628(b) – and with the statutory language and plain intent of Congress – and is consistent with the Commission's explicit holdings in *DirecTV*, *Echostar*, and *RCN*.

Third, AT&T's damages claims also fail because AT&T's request does not comply with Commission rules and because the claims are unsupported by evidence. Under Section 76.1003(d)(2)-(3) of the Commission's rules, damages may only be awarded where (1) the "defendant knew, or should have known that it was engaging in conduct violative of Section 628;" and (2) the complaint includes "[a] computation of each and every category of damages for which recovery is sought" along with all relevant documents used in the computation, or an explanation of the documents or information not in the plaintiff's possession necessary for a computation of damages, an explanation of why it does not have access to such information or documents, a statement explaining its basis for belief in the existence of such documents or information, and a detailed outline of the method of computing damages based on the evidence

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application can properly be withheld when to apply the new rule to past conduct or prior events would work a 'manifest injustice'").

171 *See Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.2d 1095, 1103 (D.C. Cir. 2001).

172 *See id.* (quoting *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) and citing *Pub. Serv. Co. of Colo. V. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996)).

expected to become available.[173] The Complaint satisfies none of these explicit requirements for any of its damages claims.

AT&T identifies six (6) categories of damages it claims to suffer as a result of being denied access to Channel 4 SD: (1) an increase in the per-subscriber cost of programming due to its claimed loss of subscribers;[174] (2) increased marketing costs designed to avoid reaching or to win over potential customers that would demand Channel 4 SD;[175] (3) increased "transaction costs" based the supposed "necessity" to warn customers that they will not receive Channel 4 SD with their U-verse service;[176] (4) increased customer service costs to deal with claimed "increased rates of cancellation and disconnection" due to the absence of Channel 4 SD from U-verse service;[177] (5) loss of actual and anticipated revenue from customers who did not take or cancelled service because AT&T lacks access to Channel 4 SD;[178] and (6) lost telephone and high speed Internet revenues due to loss of video subscribers who otherwise would have purchased AT&T's triple play bundle.[179]

The Complaint includes no information, documentation, or calculation of damages for claims (1) through (4) and (6). AT&T claims that "only some of these costs are readily quantifiable;" that it "is in the process of modeling the financial impact that Cox's withholding

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173 47 C.F.R. § 76.1003(d)(2)-(3).

174 *See* Complaint ¶ 91. This claim is also illogical. AT&T claims that it has fewer subscribers than it would have if it offered Channel 4 SD. Even if AT&T could demonstrate that any such difference in subscribers causes it to pay increased programming *rates*, programming is typically charged on a per-subscriber basis. Therefore, AT&T's programming *costs* would not rise as a result of having fewer subscribers.

175 *See id.* at ¶ 92.

176 *See id.* at ¶ 93.

177 *See id.* at ¶ 94.

178 *See id.* at ¶ 95-96.

179 *See id.* at ¶ 97.

has had on the company;" that "the process cannot be completed until AT&T's 2008 numbers are finalized;" and that "AT&T . . . reserves the right to, and intends to amend its Complaint to include a full statement of damages."[180]

AT&T cannot reserve the right to amend its Complaint to include a damages calculation because no such right exists under the Commission's rules. Section 76.1003(d)(2)-(3) requires that AT&T plead damages with specificity unless information necessary to those calculations is unavailable.[181] And if the information is unavailable, Section 76.1003(d)(3) requires a detailed outline of the methodology for calculating damages once the information does become available.[182] The rules plainly contemplate that a plaintiff might be unable to calculate damages because the necessary information is in the hands of the defendant, but it specifies a detailed showing that AT&T has not even attempted to make. AT&T claims only that it cannot calculate damages until its own "2008 numbers are finalized,"[183] though it provides no explanation of what that means, when that might be or why it was able to extrapolate from incredibly limited data when it appeared to be advantageous (to argue that Channel 4 SD was "must-have") but could not provide and rely on part-year financial numbers here.

Under these circumstances, AT&T's failure to provide its calculation of damages or a detailed outline of the methodologies for determining damages puts Cox in an untenable and indefensible position. The rules do not permit AT&T to manipulate the adjudicatory system this way, and the damage claims enumerated in Paragraphs 91-94 and 96 should be dismissed for this reason alone.

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180 *Id.* at ¶ 98.

181 47 C.F.R. § 76.1003(d)(2)-(3).

182 *See id.* at § 76.1003(d)(3).

The only damages claim for which AT&T even bothers to provide any attempted justification is its claim (5) for lost revenue for customers who never signed up for U-verse service or who cancelled that service due to the unavailability of Channel 4 SD.[184] As described above, however, the customer penetration data and customer survey data AT&T submitted in support of these claims is unreliable and insufficient to demonstrate that AT&T has lost any quantifiable number of customers due to its inability to secure access to Channel 4 SD. These alleged damages are entirely unsupported and speculative and must be dismissed as well.

VI. CONCLUSION

For the reasons stated above, Cox requests that the Commission dismiss AT&T's Complaint with prejudice.

VII. RESPONSES TO NUMBERED PARAGRAPHS

1. Cox lacks specific knowledge sufficient to admit or deny the first sentence of Paragraph 1 of the Complaint. The second sentence of Paragraph 1 contains legal conclusions to which no response is required. Cox admits that no company affiliated with Cox has entered into an agreement that would permit AT&T to distribute "regional sports programming," however defined. Paragraph 1 is otherwise denied. Further, Cox denies that the conduct alleged in this Paragraph violates any provision of the Communications Act of 1934, as amended, or any provision of the Commission's rules.

2. Cox admits that Cox has exclusive rights to distribute some San Diego Padres baseball games and that it distributes those games using its wholly-owned Channel 4 SD. To the extent the first sentence of Paragraph 2 consists of AT&T's characterization of the

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183 Complaint ¶ 98.

184 *See* Complaint, ¶¶ 95-96.

Commission's *Program Access Order*, 22 FCC Rcd 17791 (2007), that order speaks for itself. The first sentence of Paragraph 2 is otherwise denied. The balance of Paragraph 2 comprises conclusory statements regarding disputed facts and unspecified Commission orders. To the extent any response to these assertions is required, the balance of Paragraph 2 is denied.

3. Paragraph 3 of the Complaint consists of conclusory statements regarding disputed facts, legal conclusions that require no response, and characterizations of various Commission orders. To the extent that AT&T characterizes the Commission's orders, those orders speak for themselves. Paragraph 3 is otherwise denied.

4. Paragraph 4 of the Complaint is a legal conclusion to which no response is required. To the extent a response is required, Paragraph 4 is denied.

5. Cox lacks sufficient knowledge to admit or deny Paragraph 5 of the Complaint.

6. Cox lacks sufficient knowledge to admit or deny Paragraph 6 of the Complaint.

7. Paragraph 7 of the Complaint consists of legal conclusions to which no response is required. To the extent a response is required, Cox admits that AT&T is a multichannel video programming distributor ("MVPD"). Cox lacks sufficient information to respond to the balance of paragraph 7.

8. Cox admits Paragraph 8 of the Complaint.

9. Cox admits Paragraph 9 of the Complaint.

10. Cox admits that Cox's wholly-owned Channel 4 SD has the exclusive rights to distribute some San Diego Padres baseball games in the San Diego market; that Channel 4 SD distributes some sports programming involving San Diego State University, the University of San Diego, and local high school football teams; and that Channel 4 SD also distributes local news and entertainment programming. Cox denies the balance of Paragraph 10.

11. Paragraph 11 of the Complaint consists of legal conclusions to which no response is required.

12. Cox admits Paragraph 12 of the Complaint.

13. Cox admits Paragraph 13 of the Complaint.

14. Cox lacks sufficient knowledge to admit or deny Paragraph 14.

15. Cox admits Paragraph 15 of the Complaint to the extent it alleges that (1) AT&T is providing triple-play service in some parts of Cox's franchised service area in the city of San Diego; and (2) AT&T provides DISH TV service in San Diego. Cox lacks sufficient information to admit or deny the balance of Paragraph 15. To the extent Paragraph 15 cites the Commission's *Program Access Order*, 22 FCC Rcd 17818 ¶ 196, 17828 ¶ 52 n.277 (2007) to establish the facts alleged, the Commission's order speaks for itself. Otherwise, Paragraph 15 is denied.

16. Cox lacks sufficient information to admit or deny Paragraph 16, except that: (1) Cox admits that cable operators provide an attractive video product to be competitive; and (2) Cox denies that it has entered into licensing agreements with AT&T covering satellite-delivered programming. To the extent AT&T cites Commission Orders for the proposition that the Commission defines "must-have" programming as that which an operator must be able to carry to remain competitive, Commission's orders speak for themselves. Otherwise, Paragraph 16 is denied.

17. Cox admits Paragraph 17 of the Complaint to the extent it alleges that Cox has not entered into or begun negotiating a licensing agreement that would allow AT&T to carry Channel 4 SD. Cox denies that Channel 4 SD is "must-have" programming and Cox denies that

AT&T "must have" or must be permitted to have Channel 4 SD to compete for video subscribers in San Diego. Otherwise, Paragraph 17 of the Complaint is denied.

18. Cox lacks sufficient knowledge to admit or deny Paragraph 18 of the Complaint, except that Cox denies AT&T is unable to "provide meaningful competition" without access to Channel 4 SD or that San Diego residents are being "deprived of a vibrant MVPD alternative."

19. Cox admits that AT&T sent an email to Cox on October 5, 2005, which speaks for itself. Otherwise, Cox denies Paragraph 19 of the Complaint.

20. Cox admits that AT&T sent an email to Cox on October 12, 2005, which speaks for itself. Otherwise, Cox denies Paragraph 20 of the Complaint.

21. Cox admits that it informed AT&T that it would not license Channel 4 SD to AT&T. Otherwise, Cox denies Paragraph 21 of the Complaint.

22. Cox admits that AT&T sent an email to Cox on October 17, 2005, which speaks for itself. Otherwise, Cox denies Paragraph 22 of the Complaint.

23. Cox admits that it sent an email to AT&T on October 27, 2005, which speaks for itself. Otherwise Paragraph 23 of the Complaint is denied.

24. Cox denies the first sentence of Paragraph 24 of the Complaint. Cox admits that AT&T contacted Cox by telephone on June 27, 2008, and that Cox again informed AT&T that it would not license Channel 4 SD to AT&T. Otherwise, Cox denies Paragraph 24.

25. Cox admits AT&T sent an email to Cox on June 27, 2008, which speaks for itself. Otherwise Cox denies Paragraph 25 of the Complaint.

26. Cox admits AT&T's sent an email to Cox on July 7, 2008, which speaks for itself. Otherwise Cox denies Paragraph 26 of the Complaint.

27. Cox admits that it sent an email to AT&T on July 9, 2008, which speaks for itself. Otherwise Cox denies Paragraph 27 of the Complaint.

28. Cox admits AT&T sent a letter to Cox on July 18, 2008, which speaks for itself. Otherwise Cox denies Paragraph 28 of the Complaint.

29. Cox admits that it sent a letter to AT&T on July 30, 2008 letter to AT&T, which speaks for itself. Otherwise Cox denies Paragraph 29 of the Complaint.

30. Cox denies Paragraph 30 of the Complaint.

31. Cox lacks sufficient information to admit or deny Paragraph 31 of the Complaint. To the extent a response is required, Cox denies Paragraph 31.

32. Cox lacks sufficient information to admit or deny Paragraph 32 of the Complaint. To the extent a response is required, Cox denies Paragraph 32.

33. Cox lacks sufficient information to admit or deny Paragraph 33 of the Complaint. To the extent a response is required, Cox denies Paragraph 33.

34. Cox lacks sufficient information to admit or deny Paragraph 34 of the Complaint. To the extent any response is required, Cox denies Paragraph 34.

35. Cox lacks sufficient information to admit or deny Paragraph 35 of the Complaint. To the extent any response is required, Cox denies Paragraph 35.

36. Cox lacks sufficient information to admit or deny Paragraph 36 of the Complaint. To the extent any response is required, Cox denies Paragraph 36.

37. Cox lacks sufficient information to admit or deny Paragraph 36 of the Complaint. To the extent any response is required, Cox denies Paragraph 37.

38. Cox denies Paragraph 38 of the Complaint.

39. Cox admits it is aware it is not licensing Channel 4 SD to AT&T. Cox also admits it properly advertises its exclusive rights to distribute San Diego Padres baseball games on Channel 4 SD. Cox denies the balance of Paragraph 39.

40. Paragraph 40 of the Complaint consists of AT&T's characterization of advertisements it has attached to the Complaint; those advertisements speak for themselves.

41. Cox admits that it licenses Channel 4 SD to other traditional wireline cable operators, cable overbuilders, and satellite master antenna providers, including Time Warner Cable. Cox admits that Time Warner Cable's franchise area borders and in some areas overlaps Cox's franchise area in San Diego. Cox admits that it vigorously competes with all competitive video providers operating in its service territories. Cox admits that it does not license Channel 4 SD to AT&T or direct broadcast satellite operators. Cox admits that it uses Channel 4 SD properly to attract customers in the highly competitive San Diego video market. To the extent Paragraph 41 of the Complaint includes a characterization of Cox's July 9, 2008 email to AT&T, that email speaks for itself. Cox otherwise denies Paragraph 41.

42. Paragraph 42 of the Complaint consists of AT&T's characterization of the Commission's *Program Access Order*; that order speaks for itself. Cox admits that it is aware of the *Program Access Order*. To the extent any further response is required, Cox denies Paragraph 42.

43. Paragraph 43 consists of AT&T's characterization of various Commission orders; those orders speak for themselves. To the extent any further response is required, Cox denies Paragraph 43.

44. Paragraph 44 consists of AT&T's characterization of various Commission orders; those orders speak for themselves. To the extent any further response is required, Cox denies Paragraph 44.

45. Paragraph 45 consists of AT&T's characterization of various Commission orders and other writings attributable to the Commission; those orders and other writings speak for themselves. To the extent any further response is required, Cox denies Paragraph 45.

46. Cox admits that it intends to compete vigorously with AT&T in the San Diego market. Cox admits that it is offering customers access to Padres.TV and that the service permits Cox subscribers to watch Padres games online. Cox lacks sufficient information to admit or deny whether AT&T "stands poised to offer 'triple play' competition to Cox." To the extent Paragraph 46 of the Complaint contains characterizations of Commission orders and reports of the United States Government Accounting Office, those documents speak for themselves. Cox otherwise denies Paragraph 46 of the Complaint.

47. Cox denies Paragraph 47 of the Complaint.

48. Cox denies Paragraph 48 of the Complaint.

49. Cox denies Paragraph 49 of the Complaint, except that Cox admits it does not license Channel 4 SD to AT&T and DBS providers and that it vigorously competes with all its competitors in the San Diego market.

50. Paragraph 50 of the Complaint consists entirely of legal conclusions to which no response is required. To the extent any response is required, Cox denies Paragraph 50.

51. Paragraph 51 of the Complaint includes a quotation from Section 628(b) of the Act; that statute speaks for itself.

52. Paragraph 52 of the Complaint consists of AT&T's characterization of and quotations from the *MDU Order*, which speaks for itself.

53. Paragraph 53 of the Complaint consists of AT&T's characterization of and quotations from the *MDU Order*, which speaks for itself.

54. Paragraph 54 of the Complaint consists of AT&T's characterization of and quotations from the *MDU Order*, which speaks for itself.

55. Cox denies Paragraph 55 of the Complaint.

56. Cox denies Paragraph 56 of the Complaint.

57. Paragraph 57 of the Complaint consists of incomplete quotations from and AT&T's characterization of the Commission's order in *DirecTV, Inc. v. Comcast Corporation*, which speaks for itself.

58. Paragraph 58 of the Complaint consists of incomplete quotations from and AT&T's characterization of the Commission's order in *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp.*, which speaks for itself.

59. Paragraph 59 of the Complaint consists of AT&T's characterization of various Commission orders, all of which speak for themselves, and legal conclusions to which no response is required. To the extent any response is required, Cox denies Paragraph 59.

60. Paragraph 60 of the Complaint consists of legal conclusions, to which no response is required, and a quotation from the Commission's *General Motors Order*, which speaks for itself. To the extent any response is required to AT&T's legal conclusions, Cox denies them.

61. Paragraph 61 of the Complaint consists of legal conclusions, to which no response is required, and AT&T's characterization of and quotations from various FCC orders, all of

which speak for themselves. To the extent any response is required to AT&T's legal conclusions or characterizations of Commission orders, Cox denies Paragraph 61.

62. Paragraph 62 of the Complaint consists of legal conclusions, to which no response is required, and AT&T's characterization of and quotations from various FCC orders, all of which speak for themselves. To the extent any response is required to AT&T's legal conclusions or characterizations of Commission orders, Cox denies Paragraph 62.

63. Cox denies Paragraph 63 of the Complaint.

64. Cox denies Paragraph 64 of the Complaint.

65. Cox denies Paragraph 65 of the Complaint.

66. Cox denies Paragraph 66 of the Complaint.

67. Cox denies Paragraph 67 of the Complaint.

68. Cox denies Paragraph 68 of the Complaint, except that Cox lacks sufficient information to admit or deny the second and third sentences of Paragraph 68.

69. Cox lacks sufficient information to admit or deny the first sentence of Paragraph 69. The second and third sentences contain quotes and AT&T's characterization of the *MDU Order*, which speaks for itself. The third and fourth sentences of Paragraph 69 consist of AT&T's characterization of a reports of the United States General Accounting Office, which speak for themselves. Cox denies the fifth sentence of Paragraph 69.

70. Cox lacks sufficient information to admit or deny the first four sentences of Paragraph 70 of the Complaint. The fifth sentence of Paragraph 70 consists of a quote from various Commission documents, which speak for themselves.

71. Cox denies Paragraph 71 of the Complaint and denies that competition between itself and AT&T will lead to less diversity or lower quality video service to San Diego viewers.

72. Cox denies Paragraph 72 of the Complaint and that its decision not to license Channel 4 SD to AT&T inhibits AT&T from providing broadband or advanced services.

73. The first sentence of Paragraph 73 of the Complaint consists of AT&T's characterization of the Commission's *Local Franchising Order*, which speaks for itself. Cox denies the second and third sentences of Paragraph 73 and denies that its decision not to license Channel 4 SD to AT&T in any way limits AT&T's ability to offer its service. The fourth sentence of Paragraph 73 is a legal conclusion to which no response is required. Cox denies the balance of Paragraph 73.

74. Paragraph 74 of the Complaint consists entirely of legal conclusions, to which no response is required, and AT&T characterization of the Commission's *MDU Order*, which speaks for itself. To the extent any response is required, Cox denies Paragraph 74.

75. Paragraph 75 of the Complaint consists entirely of legal conclusions, to which no response is required, and AT&T's characterization of and quotations from the Commission's *Local Franchising Order* and the opinion of the United States Circuit Court of Appeals for the District of Columbia in *United States Telecom Ass'n v. FCC*, which speak for themselves. To the extent a response is required, Cox denies paragraph 75.

76. Paragraph 76 of the Complaint consists entirely of legal conclusions to which no response is required. To the extent a response it required, Cox denies Paragraph 76.

77. Cox denies paragraph 77 of the Complaint.

78. Paragraph 78 of the Complaint consists of legal conclusions to which no response is required. To the extent a response is required, Cox denies Paragraph 78.

79. Paragraph 79 of the Complaint consists of AT&T's characterization of Section 628(b) and 706 of the Act, which speak for themselves.

80. Cox denies Paragraph 80 of the Complaint.

81. Cox denies Paragraph 81 of the Complaint.

82. Paragraph 82 of the Complaint consists of AT&T's characterization of and quotations from the Commission's *MDU Order*, which speaks for itself.

83. Paragraph 83 of the Complaint consists of a legal conclusion to which no response is required. To the extent a response is required, Cox denies Paragraph 83.

84. Cox incorporates by reference the foregoing paragraphs as fully stated herein.

85. Cox denies Paragraph 85 of the Complaint.

86. Cox denies Paragraph 86 of the Complaint.

87. Paragraph 87 of the Complaint is a legal conclusion to which no response is required. To the extent a response is required, Cox denies Paragraph 87.

88. Cox denies the first sentence of Paragraph 88 of the Complaint. The second sentence of paragraph 88 is a request for Commission action, which Cox opposed.

89. Paragraph 89 is a request for Commission action. To the extent a response is required, Cox denies that it has violated any Commission rule or right belonging to AT&T or that the Commission should order Cox to permit AT&T to license Channel 4 SD.

90. Cox denies Paragraph 90 of the Complaint.

91. Cox denies Paragraph 91 of the Complaint.

92. Cox denies Paragraph 92 of the Complaint.

93. Cox denies Paragraph 93 of the Complaint.

94. Cox denies Paragraph 94 of the Complaint.

95. Cox denies Paragraph 95 of the Complaint.

96. Cox denies Paragraph 96 of the Complaint.

97. Cox denies Paragraph 97 of the Complaint.

98. Cox lacks sufficient information to admit or deny the allegations contained in the first three sentences of Paragraph 98 of the Complaint. The balance of Paragraph 98 consists of legal conclusions and a request for Commission action, which Cox opposes.

99. Cox denies the allegations contained in the first and last sentences of Paragraph 99. The remainder of Paragraph 99 consists of AT&T's characterization of and quotations from the Commission's *1998 Program Access Implementation Order*, which speaks for itself.

The remainder of the Complaint consists of requests for relief which Cox opposes.

REDACTED – FOR PUBLIC INSPECTION

WHEREFORE, the defendant requests that the Commission dismiss the Complaint with prejudice.

Respectfully submitted,

By: _____

David J. Wittenstein
David E. Mills
Jason E. Rademacher

DOW LOHNES PLLC
1200 New Hampshire Ave., N.W., Suite 800
Washington, D.C. 20036
Telephone: (202) 776-2000

Counsel for Defendant

Dated: October 27, 2008

Verification

To the best of my knowledge, information and belief formed after reasonable inquiry, this Answer To Amended Complaint is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any improper purpose.

_____
David J. Wittenstein

October 27, 2008

REDACTED – FOR PUBLIC INSPECTION

Certificate of Service

I, Cynthia M. Forrester, a secretary at the law firm of Dow Lohnes PLLC, hereby certify that, on this 27th day of October, 2008, copies of the foregoing "Answer To Amended Complaint" were sent via hand delivery and electronic mail, to the following:

Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini
AT&T Services, Inc.
1120 20th St., NW, Suite 1000
Washington, D.C. 20036

Lynn R. Charytan
Heather M. Zachary
Dileep S. Srihari
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006

_____
Cynthia M. Forrester

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
AT&T Services, Inc. and	)	
Pacific Bell Telephone Company	)	
d/b/a SBC California	)	
d/b/a AT&T California,	)	File No. CSR-8066-P
	)	
Complainants,	)	
	)	
v.	)	
	)	
CoxCom, Inc.,	)	
	)	
Defendant.	)	

RESPONSE TO HOLLANDER DECLARATION

CoxCom, Inc. ("Cox") files this Response To Hollander Declaration (the "Response") so that, in the event the Commission denies Cox's Motion to Strike Improper Material From AT&T's Reply,[1] the Commission will have the benefit of Cox's response to the Hollander Declaration,[2] the new evidence AT&T submitted for the first time in its Reply.[3] If the Commission grants the Motion to Strike there would be no need to consider this Response. If the Motion to Strike is denied, Cox submits this Response, which is focused solely on the Hollander Declaration.

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1 *See* Motion to Strike Improper Material from AT&T's Reply, File No. CSR-8066-P, filed December 9, 2008 (the "Motion to Strike").

2 *See* Declaration of Kenneth A. Hollander Submitted on Behalf of AT&T Services and Pacific Bell Telephone Company in Their Program Access Complaint Before the Federal Communications Commission, dated November 20, 2008, and filed as an attachment to the Reply (the "Hollander Declaration").

3 *See* Reply of AT&T to Answer to Amended Program Access Complaint, File No. CSR-8066-P, filed November 21, 2008 (the "Reply").

Introduction and Summary

The Hollander Declaration and the Survey upon which it relies are fundamentally flawed and cannot withstand expert scrutiny.[4] Dr. Michael Rappeport, an acknowledged expert in consumer preference surveys, demonstrates this in his Review of Kenneth A. Hollander's Survey in Support of AT&T's Program Access Complaint Against CoxCom, Inc. (the "Review").[5]

As Dr. Rappeport demonstrates, Mr. Hollander's methodology and analysis fail to provide any useful information and certainly fail to show whether San Diego video consumers view Padres programming as "must-have." The primary (but not the only) reason for this failure is that the survey fails to measure the value of Padres programming to the sample group.[6] Padres programming is presented as a no-cost proposition, which generates the unsurprising result that some people will want "something for nothing." As Mr. Hollander puts it, some respondents were "influenced" by the availability of Padres programming. But the fact that some respondents naturally would prefer a service that advertises itself as *having* Padres programming over a service that advertises itself as *lacking* that programming, all else being equal, is not probative of any issue in this case.[7] And this has nothing to do with whether AT&T actually would charge more for U-verse if it has Channel 4 SD, which AT&T surely will deny. The point is that a study that fails to ascertain how much value (if any) respondents place on the

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4 Cox continues to maintain that Section 628 does not require cable operators to provide access to terrestrially-delivered programming (like Channel 4 SD) as a matter of settled law, and therefore AT&T's attempt to show that lack of access significantly hinders or prevents its ability to provide its own satellite service to customers is irrelevant. *See* Answer to Amended Program Access Complaint, File No. CSR-8066-P, filed October 27, 2008. Nonetheless, to the extent the Commission finds a reason to address this issue, Cox includes this Response with its other arguments.

5 The Review is attached as Exhibit A to the Declaration of Dr. Rappeport, attached hereto. Dr. Rappeport's *Curriculum Vitae* is attached to his Declaration as Exhibit B.

6 *See* Review at 6-9.

7 *See id.* at 6.

programming cannot meaningfully show whether any of those respondents would consider such programming essential to their purchasing decision, i.e., "must have" programming.

In addition, as Dr. Rappeport demonstrates, even if the flawed data were taken as reliable, purely for the sake of argument, it does not show what Mr. Hollander concludes. Mr. Hollander's conclusions significantly overstate the importance of Padres programming even to his own sample group.[8] While Mr. Hollander asserts that lack of access to Padres programming may "influence" the purchasing decisions of up to thirteen percent (13%) of San Diego consumers,[9] Dr. Rappeport concludes that even the flawed data generated by Mr. Hollander shows that the most accurate estimate of the percentage of consumers who might consider the Padres to be must have programming is about four percent (4%).[10] This is a small and speculative potential competitive impact, and it cannot satisfy the requirement of Section 628(b) that AT&T show its ability to provide service in San Diego is "hindered significantly."[11]

As a result of this complete rebuttal of the Hollander Declaration, and Cox's previous demonstration that AT&T's own internal "survey" was badly flawed, AT&T has provided no competent evidence that Channel 4 SD is "must-have" programming for San Diego consumers of multichannel video programming services.

Dr. Rappeport's Analysis of the Hollander Declaration

At the outset, Dr. Rappeport identifies at least two examples of sample bias in Mr. Hollander's survey methodology. First, the Hollander Survey excludes current subscribers to AT&T's U-verse service.[12] But excluding these potential respondents makes no sense, because

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8 *See* Review at 5.

9 *See* Hollander Declaration ¶ 49.

10 *See* Review at 11.

11 *See* 47 U.S.C. § 548(b).

12 *See* Review at 3.

these are – by definition – video customers for whom Channel 4 SD obviously is not "must-have" programming. The result is a sample bias in favor of AT&T. As Dr. Rappeport explains "eliminating these people who claim to be current subscribers overestimates the proportion of those who want Padres games."[13] And, because Mr. Hollander never describes how large a group was excluded from his sample, there is no way to quantify exactly how large this group is. Excluding current AT&T customers introduces an unquantifiable sample bias favoring AT&T's desired conclusions.

The second example of sample bias is Mr. Hollander's exclusion of people with "atypical knowledge" – i.e., they or some member of their immediate family work for a satellite or cable provider, a marketing or market research firm, an advertising or public relations agency, a law firm, a newspaper, magazine, radio or television station, or an Internet provider. While a more narrow exclusion might be reasonable – e.g., employees of AT&T because they might answer questions to favor their employer – excluding other categories is unjustified. As Dr. Rappeport explains, "everyone else is telling you what they would do if the service was offered, and it does not matter whether this is because of the ad or just because of their prior knowledge, and their attitudes about the importance of Padres' games."[14] While the bias here is difficult to quantify, this exclusion assures that the pool did not reflect the preferences of all San Diegans, and here again Mr. Hollander did not explain how many were excluded on this ground.

These sampling errors alone undermine the credibility of the Hollander Survey and the conclusions in the Hollander Declaration, but they only scratch the surface. The design of the survey itself is fundamentally flawed.

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13 *See* Review at 3.

14 *Id.* at n.2.

As Dr. Rappeport explains, there are two realistic approaches to defining the effect on consumers of the unavailability of Padres programming: (1) determine whether access to Padres games is a "plus factor" for some consumers and quantify the disadvantage to a competitor that cannot offer it; and (2) determine whether there are consumers – and how many – who would not consider purchasing a service without the Padres (assuming reasonable differences in price), such that the programming is "must have" for them.[15]

The problem with Mr. Hollander's survey is that it fails to take either approach, because it conflates the two inquiries. The survey identifies a pool of consumers who *might* belong either in the first or in the second category, but they are mixed with consumers who belong in neither. Mr. Hollander combines all respondents who have any interest in Padres programming ("influenced") and concludes that they all view Padres programming as "must have."[16] As Dr. Rappeport concludes, "in essence, what Mr. Hollander says is that AT&T's claim is: For any household where Padres games are at all desired, they are 'must-have.'"[17] This, of course, is legally insufficient here, because an untested desire for Padres programming cannot possibly be enough to demonstrate that AT&T's ability to compete is significantly hindered.

In Dr. Rappeport's opinion, a valid study of whether San Diego consumers consider Padres games to be "must-have" programming, i.e., whether the lack of Padres programming actually significantly hinders the ability to sell video services, must estimate the distribution of how much consumers would pay for the programming.[18] Only by doing this could one

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15 *See* Review at 3-5.

16 *See id.* at 5.

17 *Id.*

18 *See id.* at 6.

determine whether there are consumers (and how many) who truly value the programming enough to refuse to purchase a service without it.

Flowing from this critical fault, Dr. Rappeport concludes that "**The critical error in Mr. Hollander's design is that Padres games are presented to respondents as if having live access to Padres games was completely costless.**"[19] By omitting questions that assign any cost or value to the selection of one option over another, and only asking whether the respondents would like "x" or "x + 1," the Hollander survey presents viewers with a meaningless choice that yields no useful information on the original question.[20] Indeed, given this choice, it is unsurprising that the survey subjects indicated a preference for a service that included Padres programming over one that did not.

In addition, as Dr. Rappeport observes, Mr. Hollander's own data shows that cost was a far more significant factor influencing the respondents' interest in AT&T's U-verse service than the presence or absence of Padres games. More than four times as many respondents cited the cost of the service as a key factor in their interest level as noted the presence or absence of Padres games.[21] Notably, this was true despite the fact that the ads highlighted the presence or absence of Padres games did not differentiate between the costs of the services. According to Dr. Rappeport, from a competitive standpoint, Mr. Hollander's study indicates that it could more effectively provide a competitive service by reducing the cost of the U-verse service and competing with Cox on price than by adding Padres programming.

AT&T may say that it does not plan to charge more for its U-verse service with Channel 4 SD, so Mr. Hollander's approach is correct. But this is wrong, and it misses the point. The

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19 Review at 6 (emphasis in original).

20 *See id.* at 8.

21 *See id.* at 7.

relevance of using price is as a method to determine whether people actually value Padres programming, and, if so, how much. Asking how much consumers would spend to receive the programming is a reliable way to determine the level of interest.[22] In the end, without distinguishing levels of interest with a cost or value component, the Hollander survey does not determine whether and how many San Diego residents really consider Padres games to be "must-have" programming.[23]

Accordingly, Dr. Rappeport concludes that, "in my opinion, **Mr. Hollander's total failure to ascertain what potential consumers are willing to pay for live coverage of Padres games is the key reason that his results are essentially useless.**"[24] Mr. Hollander's results show, at most, that all other things being equal, some potential customers prefer the service if it includes Padres programming to a similar service that does not include such programming. This is insufficient to determine that AT&T's ability to compete in San Diego is significantly hindered.

Another, independent reason to reject the Hollander Declaration is that the conclusions Mr. Hollander tries to draw from his flawed data do not find support even in his own data. Although Dr. Rappeport views Mr. Hollander's data as essentially useless, he was asked to assume, solely for the sake of argument, that the data could be used.[25] In assessing the data from this hypothetical perspective, Dr. Rappeport notes that at most, an estimated nine percent (9%) of

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22 *See* Review at 7.

23 *See id.* at 9. Dr. Rappeport notes several standard question models that Mr. Hollander could have used to determine respondents' true level of interest, but Mr. Hollander did not utilize these standard tools. Consequently, Mr. Hollander is left to rely on crude gradations of interest such as "very" and "somewhat," which bear no relationship to the unwillingness of respondents to purchase U-verse service without Padres programming. *See id.* at 7-8.

24 *Id.* at 10 (emphasis added).

25 *See id.* at 10-11.

respondents who viewed the "no-Padres ad" also said that they would not be interested in U-verse if it did not include Padres programming; but he also notes that that nine percent (9%) includes an unspecified number of respondents who were only "somewhat interested" in the programming service in the first place, for reasons that may have been entirely unrelated to the presence or absence of Padres programming.[26] Thus, the Hollander survey might show at most that nine percent (9%) of respondents were uninterested in U-verse due to some combination of lack of access to Padres games and some other, unspecified reasons.[27] The vague and unquantified role that Padres games might play in these respondents' levels of interest in U-verse cannot sustain the conclusion that even 9% of respondents consider Padres games "must have" programming, however, and it surely cannot show that the absence of Padres programming substantially hinders AT&T's ability to compete.

Dr. Rappeport concludes that the source of the best estimate of respondents who might view Padres programming as "must-have" (based on Mr. Hollander's flawed data), is a comparison of the survey results from the group that saw the "Padres Offer" ad to the results from the group that saw the "no-Padres Offer" ad. In the former, 35 respondents said they were very interested in the U-verse service, and in the latter only 28 said they were very interested in the U-verse service.[28] As Dr. Rappeport observes, the difference between these two groups is 7 respondents out of 205, or between three and four percent (3-4%).[29]

In this analysis, Dr. Rappeport explains that while Mr. Hollander's flawed data suggests somewhere between 3% and 9% of respondents might view Padres programming as "must-

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26 *See* Review at 10.

27 *See id.*

28 *See id.* at 11.

29 *See id.*

have," the 9% is almost certainly overstated, for the reasons he describes. He concludes (again, based on Hollander's data) that, given the sampling and other methodological errors, "the best estimate based on Mr. Hollander's survey of the proportion of households who see Padres games as 'must have' is 4%."[30] Thus, even if the Hollander survey were credited at all, the most it could be said to show is that perhaps 4% of consumers might view Padres programming as "must have." This is insufficient for AT&T to prove that lack of access to Channel 4 SD significantly hinders or prevents AT&T from selling its own video service to consumers in San Diego.

CONCLUSION

For the foregoing reasons, even if the Commission decides to consider the new evidence AT&T has submitted in its Reply, the Hollander Declaration and accompanying survey and argument should be rejected and accorded no weight in this proceeding. Dr. Rappeport has demonstrated that Mr. Hollander's survey is fundamentally flawed, most importantly because it fails to determine the value prospective San Diego U-verse customers might place on Padres programming. This renders his data useless in determining whether Channel 4 SD is "must-have" programming. Moreover, Dr. Rappeport has shown that even the flawed data Mr. Hollander generated overstates the effect that Padres programming is likely to have on the decisions of San Diego video service purchasers. The best estimate based on the flawed Hollander data is that 4% of possible San Diego customers might refuse U-verse service in the absence of Padres programming, a subset of customers that is far too small to show that Channel

30 Review at 11.

4 SD is "must-have" programming or that lack of access to that programming significantly hinders or prevents AT&T from selling its U-verse service.

Respectfully submitted,

By: _____

David J. Wittenstein
David E. Mills
Jason E. Rademacher
DOW LOHNES PLLC
1200 New Hampshire Ave., N.W., Suite 800
Washington, D.C. 20036
Telephone: (202) 776-2000

Dated: January 15, 2009

Counsel for Defendant

Verification

To the best of my knowledge, information and belief formed after reasonable inquiry, this Response to Hollander Declaration is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any improper purpose.

_____

David E. Mills

Dated: January 15, 2009

DECLARATION OF
DR. MICHAEL RAPPEPORT

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
AT&T Services, Inc. and	)	
Pacific Bell Telephone Company	)	
d/b/a SBC California	)	
d/b/a AT&T California,	)	File No. CSR-8066-P
	)	
Complainants,	)	
	)	
v.	)	
	)	
CoxCom, Inc.,	)	
	)	
Defendant.	)	

DECLARATION OF DR. MICHAEL RAPPEPORT

1. My name is Dr. Michael Rappeport, and I am a founding partner of R.L. Associates, where I have worked in market and survey research for the past 33 years.
2. I have been engaged by the law firm of Dow Lohnes PLLC on behalf of CoxCom, Inc. ("Cox") to review and analyze the Declaration of Kenneth A. Hollander Submitted on Behalf of AT&T Services and Pacific Bell Telephone Company in their Program Access Complaint Before the Federal Communications Commission (the "Hollander Declaration"), including the associated survey (the "Hollander Survey") in connection with Cox's preparation of its Response.
3. I was asked to provide a written report reflecting my professional opinion regarding the Hollander Declaration and the Hollander Survey. My report, entitled "Review of a Survey Conducted by Kenneth A. Hollander Submitted in Support of AT&T's

Program Access Complaint Against CoxCom, Inc." is attached hereto as Exhibit A (the "Report").

4. The Report consists solely of my professional opinions regarding the Hollander Declaration and the Hollander Survey based upon my years of experience conducting and reviewing market and survey research.

5. I am extremely familiar with surveys like the Hollander Survey and with the methodologies of such surveys through my many years of academic and practical experience and as an expert in the field of market and survey research.

6. During my 33 years at R.L. Associates I have made more than 200 appearances as an expert witness in legal cases at trial and in depositions. My testimony has dealt with statistics and statistical analysis, surveys, marketing, and public opinion in a wide range of cases including trademark infringement, libel, contract (damages) and congressional reapportionment. I also have testified as an expert in a number of quasi-judicial proceedings before a range of public boards, agencies and regulatory bodies.

7. More detail regarding my education, background, experience and expertise is included in my *curriculum vitae*, a copy of which is attached as Exhibit B.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 2009.

Dr. Michael Rappeport
Partner
R L Associates
601 Ewing Street – Suite A11
Princeton, NJ 08540
609 683 9200

EXHIBIT A

REVIEW
OF A SURVEY CONDUCTED BY KENNETH HOLLANDER IN SUPPORT OF AT&T'S PROGRAM ACCESS COMPLAINT AGAINST COXCOM, INC.

PREPARED FOR
DOW LOHNES

JANUARY 2009

RL ASSOCIATES

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Introduction

Through the firm of Wilmer Cutler Pickering Hale and Dorr (Wilmer Hale), its counsel, AT&T has brought a "program access" complaint to the Federal Communications Commission. The complaint alleges that the "ongoing and repeated refusal of [CoxCom, Inc. (Cox)] to license their regional sports programming to AT&T is in violation of the amended version of the 1934 Federal Communications Act and the Commission's program access rules."

As potential evidence for AT&T's complaint, Wilmer Hale commissioned Kenneth Hollander to conduct a survey of San Diego consumers. In particular, Mr. Hollander was asked "to determine the extent to which, if any, relevant consumers believe that the inability of AT&T's 'U-Verse' Internet-protocol-based video programming service to offer telecasts of Channel 4's San Diego Padres baseball games is a deterrent to their subscribing to the 'U-Verse' service."[1] In an effort to provide an answer to that question, Mr. Hollander conducted a consumer market research survey (the Hollander survey).

As stated by Mr. Hollander in paragraph 2 of his report, the survey design aimed to utilize respondents' reactions to advertisements as a means "to isolate and quantify the influence of the availability of Channel 4 San Diego Padres programming on respondents' level of interest in U-verse television". While it is not clear from this statement, we will see below that what Mr. Hollander essentially means by quantifying is simply counting the number of respondents who show any interest at all in having access to live telecasts of San Diego Padres games.

As Mr. Hollander makes clear, the advertisements themselves should be understood as a means to an end. That is, the goal is not to measure anything about the advertisements themselves (e.g. the ads' effectiveness in communicating any specific idea), but rather to understand how people would behave in the real world if the San Diego Padres games were available on the AT&T system.

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[1] Quotation is from paragraph 2 of the Hollander survey as presented in his Declaration dated November 20, 2008. Unless otherwise indicated all further quotations are also from the Hollander survey as presented in his Declaration.

In response to Mr. Hollander's Declaration, Dow Lohnes, counsel for Cox, asked R L Associates, and in particular Michael Rappeport, to comment on the Hollander survey. This report contains that commentary.

Outline of the Hollander Survey

The Hollander survey report is based on Internet interviews with 410 potential buyers of the AT&T service. To qualify for the main survey, a respondent had to be:

- A resident of the San Diego metropolitan area 18 years or older. (Questions A and F of the "screener").
- Who lives in a household which either currently subscribes to a video television service such as satellite or cable television, or say they are at least somewhat likely to subscribe to such a service, (screener questions C and D).
- Who makes or shares in the decision as to which service to subscribe to, (screener question B).
- Who does not have "atypical knowledge" (of cable television), because they or some member of their immediate family work for a satellite or cable provider, a marketing or market research firm, an advertising or public relations agency, a law firm, a newspaper, magazine, radio or television station, or an Internet provider, (screener Question G).[2]

Respondents who qualified for the main survey were shown one or the other of a paired set of advertisements. The ads were almost identical with the sole exception being that in the ad Mr. Hollander refers to as the "Padres Offer", the ad showed a San Diego Padres baseball player and contained the claim, "We offer Channel 4 with live coverage of San Diego Padres games.", while in the ad Mr. Hollander refers to as the "No-Padres Offer", the ad showed a San Diego Chargers football player and included a statement that the

[2] In my opinion such a restriction against people with "atypical knowledge" of the issue is not appropriate. A restriction limited to people who work for a potential provider of the services at issue makes sense, since such people's answers might not be based on the service provided, but on their commitment to one or another supplier. However, everyone else is telling you what they would do if the service was offered, and it does not matter whether this is because of the ad or just because of their prior knowledge, and their attitudes about the importance of Padres' games.

AT&T service would "not offer Channel 4, with live coverage of San Diego Padres games."

The first question respondents were asked was whether they currently subscribe to the service in the ad they were shown. Those who said they do currently subscribe to AT&T U-Verse service were eliminated from the potential survey pool. The reason given by Mr. Hollander in paragraph 27 of the report[3] is that, "Those who did already subscribe were asked no further questions because their opinions would not be relevant to the investigation." However, Mr. Hollander never explains why people who have already made the decision to buy the AT&T service are "not relevant to the investigation." Indeed, in my opinion just the opposite is true. Surely, when it comes to determining the proportion of San Diegans for whom access to Padres games offers a competitive advantage, current buyers of AT&T's service (who thus have subscribed without access to Channel 4) are people who have made it clear that Padres games are not a competitive advantage. Thus, eliminating these people who claim to be current subscribers overestimates the proportion of those who want Padres games; that is it biases the survey in favor of AT&T. One major problem in Mr. Hollander's survey is he never tells us how big this group was, and thus how great a bias was introduced.

The second question in the main questionnaire asked how interested respondents were in learning more about the service depicted in the ad they had been shown. Depending on which ad they had been shown, and their level of interest in the service, respondents were then asked one of four series of questions. Each question series was three to five questions long, and covered similar material phrased to take into account the ad they had seen and their level of interest.

Alternative Theories of the Issue in This Case

Before beginning my commentary on the survey itself, I think it is critical to examine the possible theories of what is at issue in this case, along with what I understand as the theory underlying Mr. Hollander's approach. In my opinion, there are two realistic but

[3] For some unknown reason, Hollander does not include this limitation in his list of screening questions. Indeed, as far as I can tell his only reference to it is in paragraph 27.

contrasting ways of defining the effect on consumers of the unavailability on AT&T's U-verse of Channel 4 (i.e. live broadcasts of Padres games). However, as I will discuss, I don't think Mr. Hollander bases his survey on either of these two realistic theories.

The first realistic way to define the issue is to see AT&T's claim as being that the availability of Padres games is a "plus factor" for a significant number of households in San Diego. For such San Diegans (given that Padres games are available on Cox and other multichannel video programming distributors), a system that does not provide Padres games will start with a competitive disadvantage. However, the significance of that disadvantage in the purchasing decision will differ for different consumers. Critically, households for whom Padres games are not "must have" will balance that disadvantage against the cost of the service and the availability of other services. Therefore, a service without Padres games may well still be (indeed almost certainly will be) "competitive" for some fraction of these households (in part for example by passing along to consumers the money they would otherwise pay for Padres games).[4] From this perspective, the dual questions that a survey should set out to answer are, "For what proportion of San Diego households is the absence of Channel 4 a significant disadvantage, and (presumably in dollar terms) how great is that disadvantage?"

In distinct contrast, a second realistic way to define the issue is that AT&T is claiming that Padres games are "must have" television for a significant number of households in San Diego. By which I mean that because Padres games are available on Cox and other multichannel video programming distributors, for such San Diego households a system that does not provide Padres games is simply non-competitive. This approach concentrates on identifying those consumers who, at any reasonable difference in price and nature of the services, will not even consider buying a service without live Padres games. From this perspective, the question that a survey should set out to answer is, "For what proportion of San Diego households is the absence of Channel 4 a deal breaker?"

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[4] Moreover, if every AT&T customer has to take Channel 4 this may cut both ways. Since presumably all households will have to pay even a (slightly) higher fee to cover the cost, (or give up some other feature), having Padres games might be a competitive disadvantage among those people with no interest in the games.

That is, assuming reasonable differences in price (e.g. a service with Padres games is priced no more than a few dollars higher per month), and in the availability of other channels or desired services (i.e. DVR capability), how many people will not even really consider buying a service that doesn't have access to Padres games?

In short, two contrasting ways of looking at AT&T's claims (and correspondingly two possible goals of a survey) are:

- Padres games are "must have" so not having them makes a service uncompetitive.
- Padres games are a desired service, so having them is a "competitive advantage", but not by itself decisive.

As I understand it, Mr. Hollander's approach in his survey collapses these two essentially different definitions of the issue. Indeed, throughout his analysis, Mr. Hollander does not even attempt to distinguish between people for whom the Padres games are "must have" (the competitive advantage of Padres games is essentially total), and those for whom that "competitive advantage" is but one factor in their decision process. To the contrary, because he makes no effort to quantify the degree of competitive disadvantage, he effectively claims that any respondent who expresses any interest at all in the Padres is a "must have" household.

For instance in Table 1 of Mr. Hollander's analysis, respondents who say they are "very interested" in learning more about the AT&T U-verse service they were shown in the ad are lumped together with people who say they are only "somewhat interested". Can "somewhat interested" really be the same as "must have"? Or conversely, for the somewhat interested are Padres games just one more selling point?

Thus, in essence what Mr. Hollander says is that AT&T's claim is

- For any household where Padres games are at all desired, they are "must have".

The Need for Price Questions

The degree to which a consumer really sees a particular kind of programming as valuable is surely best defined in terms of what that consumer is willing to pay for the programming. Otherwise all we are finding out is that consumers are generally interested in getting something for nothing. That is, whether the survey had been designed to meet the "competitive advantage" goal, or the "must have" goal, in order to distinguish those consumers where AT&T will be non-competitive from those consumers where AT&T can compete, we must develop an estimate of how much potential consumers are willing to pay for access to Padres games.[5] In other words, from either perspective, I think it absolutely clear that **the goal of the survey should/must be to produce an estimate of the distribution of how much consumers are willing to pay for live coverage of Padres games.**

For this reason, the critical error in Hollander's design is that Padres games are presented to respondents as if having live access to Padres games was completely costless. Respondents' reflection of interest for that programming is therefore untested in a meaningful way. That is, except for whether or not the AT&T service includes Padres games, the features and the price in the two ads shown to respondents are identical. I emphasize that I am not talking here about how much AT&T will actually charge for the service, or whether there will be any incremental change in the cost of AT&T's U-verse basic service. Rather my point is that only by investigating what consumers are willing to pay for a service can one ascertain the value of that service to consumers. In my opinion, this blurring of the issue, and in particular, the fact that his questions do not attach any price tag whatsoever to a desire for the Padres games, makes his survey essentially useless for providing information about either of the two realistic alternative definitions of the issue.

[5] This of course would not hold if AT&T is actually claiming they are non-competitive with any consumer who expresses any interest no matter how slight in Padres games.

That consumers understand cost to be the real issue is clearly shown by their answers to the first substantive question (Question 2),[6] and the follow-up question (Question 3).

2. *All things considered, how interested would you be in learning more about this service? (the service in the ad they were shown)*
    1. *Very interested*
    2. *Somewhat interested*
    3. *Probably not interested*
    4. *Not interested*
    5 *No opinion*
3. *Why do you say that you are somewhat interested in learning more about this service? Please be as specific as possible.*

82 of the 205 people who saw the No-Padres Ad answered Question 2 that they were somewhat interested in learning more about the service. As an example of what consumers really thought, in one way or another 31 of these 82 (38%) said in Question 3 that they needed to know more about the cost, while just 7 (8%)[7] said that they were concerned about the absence of Padres games. Obviously being "somewhat interested" in "learning more" does not mean the consumer wants to buy the service regardless of the cost. Rather it seems to mean that they have questions about such issues as what the complete cost is, and whether the cost would change if various features were added or removed. Of course, if indeed a major issue is cost, it seems reasonable that AT&T can effectively compete by providing a lower cost service without Padres games than the competitive (Cox and other multichannel video programming distributors) service with Padres games. After all the Padres charge significant amounts of money to carry their games, and AT&T, unlike Cox and other multichannel video programming distributors, will not have that expense.

It is not that it is difficult or even unusual to use a survey to find out how much consumers value a given product or service. To the contrary, in market research there are a number of conventional ways to get realistic estimates of that value. For instance, using closed end questions, the researcher can present each respondent with a series of pairs of alternatives, where for each pair the respondent is asked, "Which would you do"?

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[6] The wording is the same in Questions 6, 11, 14 and 19.

[7] One of these seven also mentioned the cost associated with a change of service.

- Subscribe to the AT&T U-verse service as currently constituted without Channel 4 at some base price.
- Subscribe to the AT&T U-verse service as currently constituted but plus Channel 4 at the base price plus some specified monthly surcharge.

To be specific, the respondent might be asked a series such as:

1. Would you prefer the base service at $X per month, or the enhanced service (i.e. with Channel 4) at $X+2 per month?
2. Respondents who said they would pay two dollars per month extra for Channel 4, might then be asked: Would you prefer the base service at $X per month, or the enhanced service at $X+4 per month?
3. Etc. – with the series continuing until the respondent either was no longer willing to pay the additional money, or until some fixed point (perhaps $X+8 per month) was reached.

Several kinds of control cells can be used to add explanatory power to this approach. In one control cell, the service available at a premium might be changed from Channel 4 to a channel for which data already exists (e.g. a different cable TV channel service already available at a surcharge). This approach would provide a good estimate of the difference, if any, between the survey question responses and real life, which is, of course, the actual primary reason for the use of controls.[8] Another kind of control cell would alter the order in which the premium charges were presented to the respondent. For example, we might start with a $8 per month premium, and keep reducing the premium until the respondent said they were willing to pay that premium for access to Channel 4.

A second, often utilized, way to estimate what consumers would pay for Channel 4 access to Padres games is to simply ask open ended questions about how much they would be willing to pay for that service. In this case, Channel 4 access is the test

[8] The fundamental problem of litigation surveys is that consumers know they are in a survey (which is inherently different from their real life situation). However, the intelligent use of controls means we can "parcel out" the effect of being in a survey, leaving us with the ability to predict what would happen in real life, even if we do not exactly replicate the real life process.

stimulus, and a set of other "control" stimuli might be to ask the same question for a variety of other telecom services including, (but not necessarily limited to), other cable channels. Here again, well chosen controls could provide a good estimate of the difference, if any, between the survey question responses and how consumers actually behave in real life, thus allowing us to predict "real life behavior".

The Uselessness of the Data

In terms of the two alternative goals of the survey laid out above, the information required about consumers' views of the value of the Padres games is much the same for either the "competitive advantage" goal or the "must have" goal. However, the answer to the real question of what constitutes a significant inability to compete will almost certainly differ significantly for the two goals. For instance, from a "competitive advantage" goal perspective, a willingness on the part of a consumer to pay up to an additional two dollars a month to have access to Padres games might be seen as putting AT&T at a competitive disadvantage, but it surely seems unreasonable to say that a consumer sees Padres games as "must have" television.

The issue for the Commission should not be Mr. Hollander's survey approach of does anybody want the channel without paying for it, but really how many households are willing to pay how much for the service (i.e. an analysis of the distribution of the price San Diego households are willing to pay for access to Padres games).[9] In my opinion, only by understanding this distribution can the issue even be appropriately posed and investigated.

Of course, even with such a survey there remains an open question that can only be decided by some external decision makers (e.g. if appropriate the FCC):

> Does Y% of consumers willing to pay $Z more for access to Padres games put the AT&T (No-Padres) service at a sufficient disadvantage to significantly hinder AT&T from selling its video service?

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[9] Again this is not about how much AT&T will actually charge for the service, but what consumers are willing to pay for the service.

In summation, in my opinion, Mr. Hollander's total failure to ascertain what potential consumers are willing to pay for live coverage of Padres games is what makes his results essentially useless.

Analyzing the Data

As discussed above, in my opinion Mr. Hollander's data is essentially useless for analyzing the real issue of the distribution of how much households are willing to pay for, (i.e. how badly they want), Padres games. However, if notwithstanding these flaws, one still wanted to use his data, it is possible to make some preliminary estimates[10] for the proportion of households for whom costless Padres games are "must have".

To obtain an upper limit on this estimate, we can use Question 13. In Question 13, the Hollander survey asks respondents who saw the Padres Offer ad, and expressed at least some interest in "learning more" about the service whether they would still be interested "if it turned out that it did not offer channel 4 with live coverage of San Diego Padres games." Of the 63% who had originally expressed at least some interest in the Padres Offer service, just 9% (about 1 in 7) said they would not be interested if the service did not offer Padres games. I think it is clear that because of the questions used this 9% represents an upper estimate of the proportion of households who really see Padres games as "must have".

Aside from the underlying flaws in the survey, this upper estimate is highly likely to still overestimate the real situation. Some of the households who said in Question 13 that they would not be interested in a service without Padres games may only be uninterested because of a combination of the lack of Padres games and other features of the service. This would certainly include any of the "No" answers to Question 13 who said in

[10] Unfortunately because of how Mr. Hollander presented his data, these estimates may change slightly if the actual data set was analyzed. However, I think it unlikely the result would change by more than one percent. In any case the result is conservative from the point of view of Cox since any change that did occur would be much more likely to reduce the estimate than to increase it.

Question 2 that they were only somewhat interested in a service with Padres games.[11] However, it would also include many of those who said in Question 2 that they were very interested who might be less interested if they understood what the service cost. [12]

Indeed by comparing those who saw the two ads, and said very interested in response to Question 2 we can get a second estimate for the proportion of households who really see Padres games as "must have". Of those who saw the Padres Offer ad, 35 said they were very interested in Question 2. Of those who saw the No-Padres ad, 28 said they were very interested in Question 2. Thus, a second estimate for the proportion of households who really see Padres games as "must have" is 7 households or 3% to 4%.

So we have estimates of 3% to 9% for the proportion of households who might really see Padres games as "must have". But of course, even this range is too high because, as I discussed above, Mr. Hollander excluded from his survey any respondent who already had AT&T service. Since Mr. Hollander did not include this group of consumers in his survey, I have to guess at it. Let us say for argument's sake that 10% of the respondents answered that they already have an AT&T service. Incorporating this into our estimates would give a range of 3% to 8% as the proportion of households who might really see Padres games as "must have".

Taking the midpoint of these estimates would lead to an estimate from Mr. Hollander's flawed survey that about 5% to 6% of households might see Padres games as "must have". I repeat that I consider this is highly likely to be an overestimate. Specifically I think that based on this data set, and reasonable expectations about the missing data, the best estimate of the proportion of households who see Padres games as "must have" is 4%. M. Carl Rappaport Jan 14, 2009

[11] Unfortunately, one of the places where the information provided by Hollander is insufficient for a complete analysis is that he doesn't provide a breakdown of the "No" answers to Question 13 in terms of their answer to Question 2.

[12] I note also that in Table 7 Mr. Hollander simply adds the "volunteered" results from Question 3 to the "directed" results from Questions 13 and 18, but this seems clearly to be double counting – i.e. those who volunteered the result in Question 3 were also asked Question 13 or 18 and presumably they are likely to answer Question 13 or 18 the same way they answered Question 3.

EXHIBIT B

DR. MICHAEL RAPPEPORT

Dr. Rappeport has worked in market and survey research areas for more than 40 years, the last 33 as a partner of R L Associates. As part of his function he has made more than 200 appearances as an expert witness in legal cases at trial and/or through deposition. His testimony has dealt with statistics and statistical analysis, marketing, and public opinion in cases in such disparate areas as trademark infringement, libel, damages for failure to fulfill a contract, and reapportionment. He has also testified as an expert in a number of quasi-legal proceedings before a range of public boards, agencies and regulatory bodies.

Education

B.S. Physics, RPI, Troy, New York 1957

M.S. Electrical Engineering, Yale University, New Haven 1958

PH.D. Statistics, New York University, 1968

Professional positions

1975 - present: Founding partner, R L Associates, survey research and consulting firm

Dr. Rappeport has had wide experience both in the direction of all kinds of surveys of human populations and as a consultant in statistical, strategy planning and survey research areas. Two areas in which he has been particularly active are studies on public policy, and studies for use in litigation. Along with responsibility for the management of the firm, Dr. Rappeport has direct responsibility for all statistical aspects of the firm's work. In the main this encompasses sample design and the use of a wide variety of statistical analysis techniques. He has designed projectable national and regional probability samples of all civilian non-institutional telephone households, and a very wide range of specialized samples of all types.

1969 - 1972; 1973 - 1975: Vice president and chief statistician, Opinion Research Corporation, Princeton, New Jersey

1972 - 1973: Vice president, Response Analysis Corp. Princeton, New Jersey

1959 - 1969: Supervisor, Bell Telephone Laboratories, Holmdel, New Jersey

Teaching

At various times, Dr. Rappeport has taught or conducted guest lectures in a number of colleges and universities. He has been an adjunct instructor in both Research Methods and Political Public Opinion at Rutgers University, and taught a course in Marketing at Rider College.

Articles and Speeches

Over the course of the last 25 years, Dr. Rappeport has written approximately 40 published articles, and given more than 70 speeches. He has spoken at a number of meetings of legal organizations including:

Faculty member – ABA-ALI seminar on Dilution – February 2004

Participation in a 2003 panel of the Amer. Intellectual Property Law Assoc.

Participation in a 2001 panel of the Advanced Practitioners Prog of the Intl. Trademark Assoc.

A 1998 speech to the Bar for the Federal Circuit

Witness at a mock trial at the Feb. 1998 Meeting - American Bar Association Antitrust Section

A 1996 speech to the New Jersey Intellectual Property chapter of the Inns of Court.

A 1995 panel presentation for the CLE program, American Bar Assoc. - Antitrust Section.

A 1995 speech to the CLE program, American Bar Assoc. - Intellectual Property Section

Witness at a mock trial at the 1995 meeting of the American Intellectual Property Law Assoc.

Among the wide cross-section of other types of organizations where he has spoken at an annual or other major meeting are Planned Parenthood Federation of America, United States Trademark Association, Travel and Tourism Research Association, Newspaper Research Council, Pennsylvania Hospital Association, and New Jersey Political Science Association.

Other

Dr. Rappeport is currently listed in Who's Who in America, and several other similar publications dealing with the Legal Profession, Social Sciences and Marketing. He has served on a variety of civic and professional boards. Among those most directly related to his professional activities:

Editorial Board of the "Trademark Reporter" 1993 - 1996, 1997 - 2004

Board of Advisors - Citizens Committee on Bio-Medical Ethics 1986 - 1994

New Jersey State Bio-Ethics Task Force on Public and Professional Education - 1989- 1992

Board of Directors, American Association for Public Opinion Research, 1976 - 1980; Standards Chairman, 1979 - 1980

Cases in which Michael Rappeport has appeared either by deposition or in trial as an expert witness 2003-2008. Date shown is first appearance. Unless noted all cases listed were in United States District Courts.

2008

July Deposition – American Mensa v Inpharmatica – District of Maryland
January Deposition and February Trial - Abercrombie & Fitch v Moose Creek - Cen. Dis. of California

2007

November Deposition – Hackett et al v Procter & Gamble – So District of California
September Deposition – Argus Research Group v Argus Media Inc – Connecticut
June Deposition and April 2008 Trial – First National Bank in Sioux Falls v First National Bank So. Dakota – South Dakota
January Deposition - Rexel v Rexel International – Central District of CA

2006

Dec Deposition and Jan 2007 Trial – Urban Outfitters v BCBG – ED of Pennsylvania
September Deposition – Fuji Photo Film v Benun - District of New Jersey
August Dep and Sept 2007 Trial – Bracco Diagnostics v Amersham Health – District of New Jersey
July and Jan 2007 Depositions – Commerce Bank v Commerce Insurance – District of Massachusetts
April Deposition and May Trial – Procter & Gamble et. al. v Hoffman La Roche et. al. – Southern DNY
March Deposition – Alpha International v General Foam Plastics - Eastern Dis. of North Carolina

2005

Nov. Deposition and Oct. 2006 Testimony deposition–Nextel v Motorola–Trademark Trial Appeal Board
October Deposition – Astra Zeneca v TAP Pharmaceuticals – District of Delaware
October Deposition – Arista Records et al v Columbus Farmers Market – District of New Jersey
June Deposition – The City of New York v. Albert Elovitz – Southern District New York
April Deposition and August Trial – Dosatron Intl v Agri-Pro – Middle District Florida
April Testimony Deposition – Franklin Loufrani v Wal-Mart Stores – Trademark Trial and Appeal Board
March Deposition – In the Matter of Certain Ink Markers – U.S. International Trade Commission
March Deposition – Mylan v Procter & Gamble – Southern District New York
Feb. and June Depositions – Toyota Motor Sales v Aliments Lexus – Eastern District New York

2004

August Trial – Catamount v Microsoft – District of Vermont
Feb. Deposition - Weight Watchers v Luiginos – Southern Dis NY
Feb. Trial – Trettco v HDS New England – Dis. of Massachusetts

2003

Dec. Deposition - Georgia Pacific v Procter & Gamble – No. Dis. of Georgia
Dec. Deposition and Feb 2004 Trial – Trettco v HDS New England – Dis. of Massachusetts
Sept. Deposition – Winn v. Eaton – Central Dis. of California
Aug. Deposition – In the matter of certain Agricultural Vehicles – Intl. Trademark Commission
Feb. Deposition – Microsoft v Lindows.com – West. Dis. Of Washington
Jan. Deposition and Feb. Trial - Pharmacia v GlaxoSmithKline II– District of New Jersey
Jan. Trial – Ardex v Chemrex – Western District Of Pennsylvania
Jan Deposition and Feb. Trial – Inliten v Santa's Best – Southern District Ohio

List of publications of Michael Rappeport 1992-2008

Response to Survey Methodology Articles - Trademark Reporter; May-June 2006

The Democratic Ethos and the Positive Sum Society – Society – July-August 2003

A Rejoinder to a Critique – The Trademark Reporter; November-December 2002

Litigation Surveys – Social Science as Evidence – The Trademark Reporter; July-August 2002

Applying Daubert; National Law Journal, January 21, 2002

When Consumer Beliefs are Based on a Court's Intuition - One More Issue Arising From Conopco (with Sandra Kornstein-Cohen): The Trademark Reporter; March-April 1997

Is Judaism Splitting Into Two religions; Sh'ma; April 1996

The Role of the Survey "Expert" - A Response to Judge Posner; The Trademark Reporter, March-April 1995

The Future of the American Jewish Community; Sh'ma; December 1994

The Patient Self Determination Act; Implementation of the Law in Nursing Homes; (co-author); Paper presented at the 122nd Annual Meeting of the American Public Health Association November, 1994

Condition Critical; (co-author); Paper presented at the 1994 Annual Meeting of the American Society of Law, Medicine and Ethics; October 1994

Statistically Based Evidence; National Law Journal, Op-ed Page; August 1993

Prognosis Good for Lower Medical Care Inflation; Wall Street Journal Op-Ed page; February, 1993

Predicting the Election - Why Clinton Will Win; The Sunday Record (Bergen County, New Jersey); August 1992. In addition Dr. Rappeport was a columnist on a weekly basis for the Bergen Record throughout much of 1991. Columns dealt with a wide range of statistical and public opinion issues from crime in New Jersey to the proper reporting of retail sales.

Certificate of Service

I, Ruby Brown, a secretary at the law firm of Dow Lohnes PLLC, hereby certify that, on this 15th day of January 2009, copies of the foregoing "Response to Hollander Declaration" were sent via hand delivery and electronic mail, to the following:

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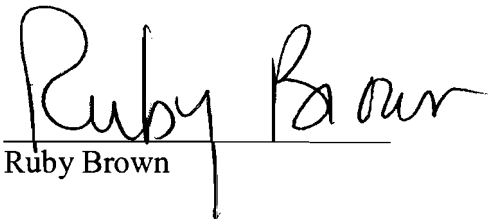

Ruby Brown